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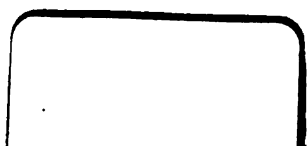
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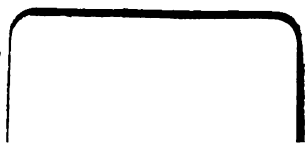


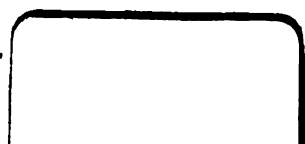
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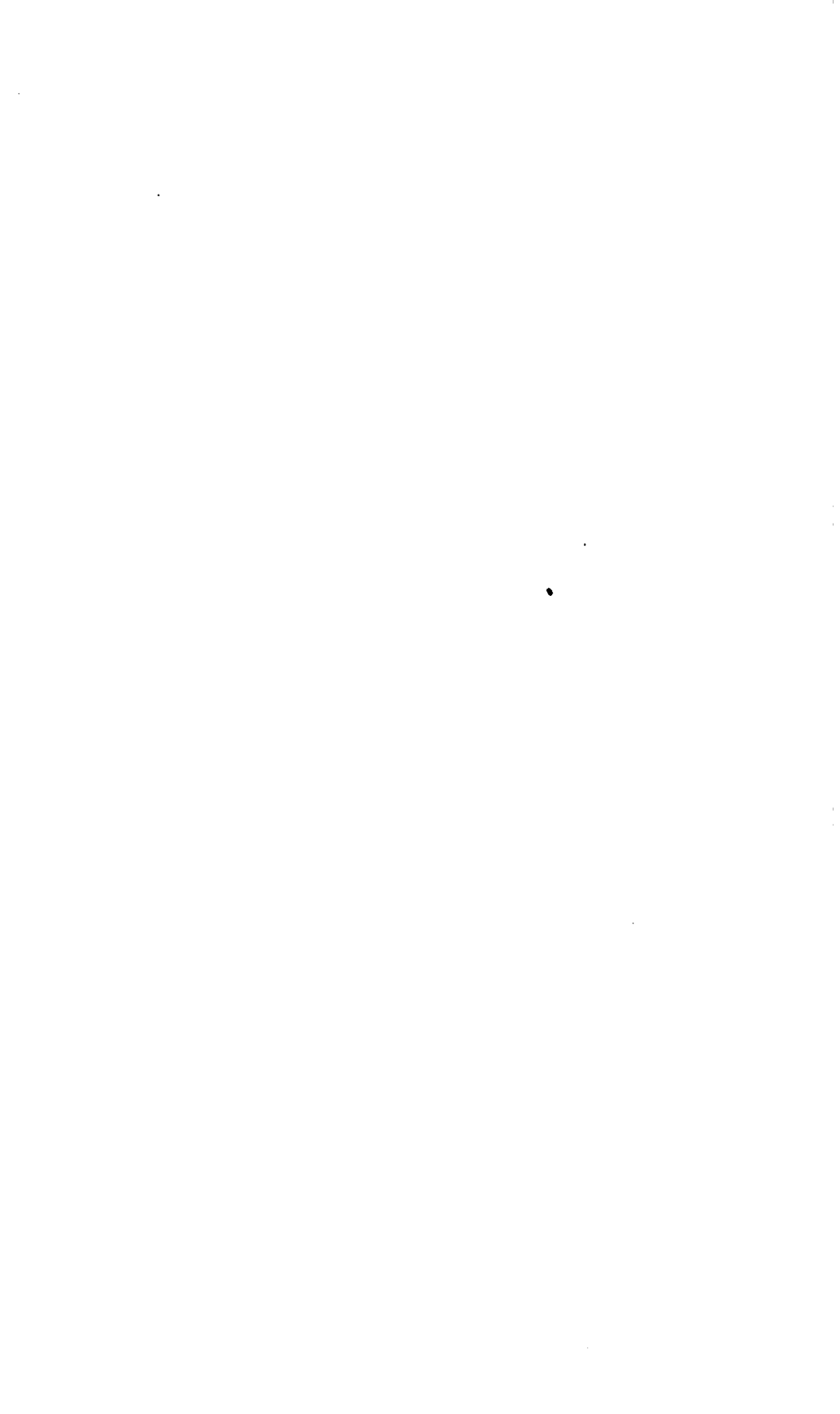


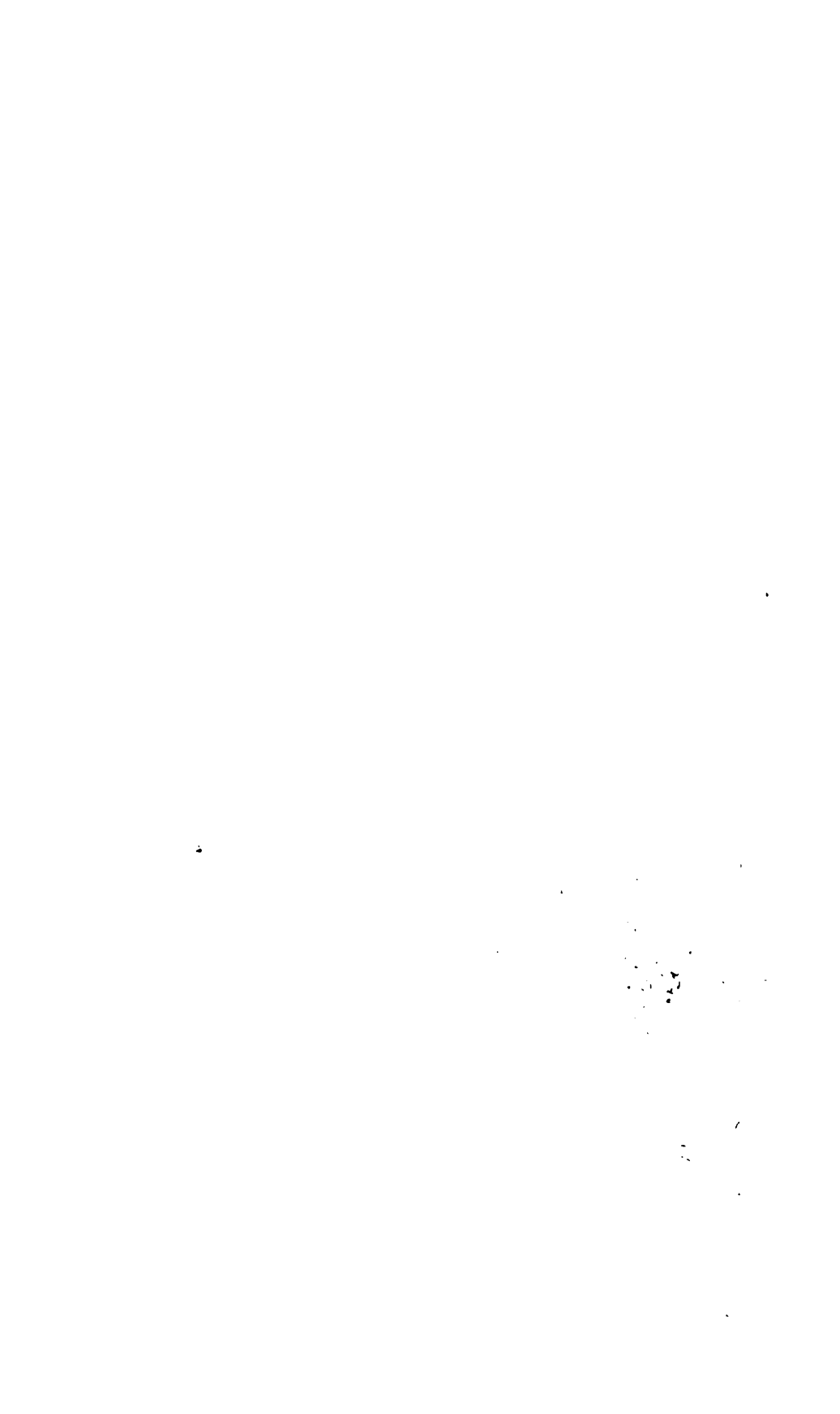


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REPORTS OF CASES

ARGUED AND RULED AT

NISI PRIUS,

IN THE COURTS OF

Queen's Bench, Common Pleas, & Exchequer;

TOGETHER WITH CASES TRIED ON

The Circuits,

AND IN

The Central Criminal Court:

FROM

EASTER TERM, 4 VICT. TO HILARY TERM, 6 VICT.

By F. A. CARRINGTON, AND J. R. MARSHMAN, ESQRS.,

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had been a tenant of Mr. Sturt, the lessor of the plaintiff, and evidence was adduced in support of that case.

For the defendant it was opened, that Mathews never held this piece of garden ground of Mr. Sturt, but that of Mr. Sturt he only held an adjoining piece of garden ground, called Bartlett's Garden, (not fenced off from the ground in question); and that the ground called Bartlett's Garden had been given up to Mr. Sturt by the defendant; and the defendant's counsel relied upon the will of the defendant's father, dated in 1791, (which was put in), as devising the land in question to the defendant, and nearly 300 acres of other land in the neighbourhood. It appeared that the defendant's father had died in Shoreditch work-house.

Platt, for the plaintiff, proposed to give evidence in reply, to shew that for a series of years, commencing with the year 1812, Mr. Sturt received rent for the ground in question, as part of his Hoxton estate.

Erle.—I submit that this cannot be done. Evidence in reply is only receivable either to contradict some witness that I have called, or to deny our title as we have set it up.

Lord DENMAN, C. J.—I think that the evidence is receivable. The lessor of the plaintiff made out a complete *prima facie* case, by shewing that you came into possession under his tenant Mathews. You set up a new case, with a view of shewing that Mathews did not hold this piece of ground of the lessor of the plaintiff, and that it was included in the devise contained in the will of the defendant's father. The other side propose to answer this by shewing, that it did not belong to the defendant's father, because it formed a part of Mr. Sturt's property. I think that I must receive the evidence (a).

(a) See the case of *Doe d. Goslee v. Goslee*, 9 C. & P. 46.

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On the part of the lessor of the plaintiff Mr. Clarkson was called. He said, "My father, Mr. Romaine Clarkson, who is dead, was the receiver of rents for Mr. Sturt's Hoxton estate for several years, from the year 1812; I have been present when he has received some of the rents; this is an account of the rents received from the tenants of the Hoxton estate for 1812; it is in the hand-writing of a deceased clerk of my father's, named Dixon; there is an indorsement upon it in my father's hand-writing, it is the words 'Hoxton rents;' the account is not signed by any one; the whole account is on one piece of paper."

Erle for the defendant.—I submit that this account is not receivable in evidence. It has no signature.

Platt.—There is an indorsement on it in the hand-writing of Mr. Romaine Clarkson, and he is the person who, by the account, is charged with the receipt of the money.

Erle.—There is nothing in this account which would have charged Mr. Romaine Clarkson in an action.

LORD DENMAN, C. J., (to the witness).—Mr. Clarkson, are you enabled to say, that accounts in this form were rendered annually by your father during the time he continued receiver?

Mr. Clarkson.—I am, my lord.

LORD DENMAN, C. J.—I think that I must receive this account in evidence. Upon the evidence that has been given to day by Mr. Clarkson; his father could have been charged in an action founded on this account.

The evidence was received.

Mr. Clarkson.—"This is another account for the year 1814; it is in my own hand-writing; there is not any of

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my father's handwriting upon it; I made out this account by the authority of my father, acting as the receiver of rents for Mr. Sturt, and this account was, in the usual course of business, rendered to Mr. Sturt. The account is not signed."

Lord DENMAN, C. J.—This is an unsigned account, written by the clerk of the receiver of rents, and rendered to the employer. I think it is receivable in evidence.

The evidence was received (*a*).

Lord DENMAN, C. J.—You must apply this evidence to the land now in question.

Platt.—I shall show that the rent stated in these accounts to have been received from Mr. Scott, was paid for the ground now in dispute.

That evidence was given, and it was proved that the lessor of the plaintiff and his father had received rent for the ground in question ever since the year 1794.

Verdict for the plaintiff.

Platt, B. Andrews, and Barstow, for the plaintiff.

Erle, Godson, C. Clark, and Horrie, for the defendant.

[Attornies—*Holme, Frampton & Young, and Smith & Allistons.*]

In the ensuing term, *Erle* applied for a new trial, but the Court refused a rule.

(*a*) See the cases of *Brune*, and *Doe d. Lichfield (Earl) v. Stacey*, 6 C. & P. 139. *Esq. v. Thompson*, post, p. 34; *Doe d. Bodenham v. Colcombe*, post;

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Sittings in London after Trinity Term, 1841.

BEFORE LORD DENMAN, C. J.

CARRUTHERS v. GRAHAM and Others.

TROVER for plate, books, china, linen, and carriages. Pleas—first, not guilty; and second, that the plaintiff was not possessed.

It was opened by *Platt*, for the plaintiff, that this action was brought to try the validity of a fiat in bankruptcy, which had been sued out against the plaintiff, under which the defendant, Graham, was the official assignee, and the other defendants the creditors' assignees.

Notice had been given of disputing the validity of the fiat, and also the petitioning creditor's debt, trading, and act of bankruptcy.

On the part of the defendant, Mr. Edward Pontifex, one of the petitioning creditors, was called to prove the petitioning creditor's debt. He stated that he had assigned his debt.

Platt, for the plaintiff.—I submit that the petitioning creditor is not a competent witness. He has a direct interest in supporting the fiat; and it has even been doubted whether the petitioning creditor is a competent witness to prove the petitioning creditor's debt, even in a criminal prosecution (a). The effect of his evidence would be (as far as the petitioning creditor's debt is concerned), to prevent the plaintiff from upsetting the fiat. In the case of *Green v. Jones* (b), it was held by Lord *Ellenborough*, that, in an action by the assignees of a bankrupt, the petitioning

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In an action brought by a bankrupt against his assignees, to try the validity of the fiat, the petitioning creditor is not a competent witness for the defendant to prove the petitioning creditor's debt; and the fact of his having assigned his debt will make no difference.

To let in the examination of a witness taken before the Master, as evidence under the stat. 1 Will. 4, c. 22, on the ground that the witness is abroad, evidence must be given to satisfy the judge that the witness is actually out of the jurisdiction of the Court at the time of the trial; and it will not be sufficient to prove that on the evening before the trial the witness was with his luggage on board a ship bound

for Montreal, the ship being then three quarters of a mile below Gravesend, waiting for her captain to come on board.

(a) See the case of *Rex v. Walters*, 5 C. & P. 138. (b) 2 Camp. 411.

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creditor was not a competent witness to support a commission of bankruptcy, although he might be called on the other side to prove it invalid; and his Lordship observes, that the petitioning creditor "enters into a bond to the Lord Chancellor, conditioned to establish the several facts upon which the validity of the commission depends, and to cause it to be effectually executed. He has, therefore, a clear and direct interest in the question at issue." That decision related to a commission of bankrupt, but under the stat. 6 Geo. 4, c. 16, s. 13, the petitioning creditor, before a fiat in bankruptcy is issued, must now "give bond to the Lord Chancellor in the penalty of £200, to be conditioned for proving his or their debt or debts, as well before the commissioners as upon *any trial of law, in case the due issuing forth of the commission be contested*, and also for proving the party to have committed an act of bankruptcy at the time of taking out such commission, and to proceed on such commission." And by the 16th section of the Bankruptcy Court Act, 1 & 2 Will. 4, c. 56, all "laws, statutes, rules, and orders" then in force relating to bankruptcy, are to extend to fiats in bankruptcy, so far as they are applicable thereto.

Kelly, Montagu Chambers, and Butt, for the defendants. —By the 13th section of the Bankrupt Act, 6 Geo. 4, c. 16, the bond of the petitioning creditor is not to be assigned to the party who is sought to be made bankrupt, merely because the petitioning creditor cannot support the fiat. The words of the section are, "but if such debt or debts shall not be really due, or if, after such commission taken out, it be not proved that the party had committed an act of bankruptcy at the time of the issuing of the commission, *and it shall also appear that such commission was taken out fraudulently or maliciously*, the Lord Chancellor shall and may, upon petition of the party or parties against whom the commission was so taken out, examine into the same, and order satisfaction to be made to him or them for

the damages by him or them sustained; and for the better recovery thereof, may assign such bond or bonds to the party or parties so petitioning, who may sue for the same in his or their name or names." In the case of *Wright v. Lainson and Another (a)*, which was an action against the Sheriff of Middlesex for a false return of nulla bona to a writ of fieri facias, the defendants wished to set up the bankruptcy of the person against whom the writ of fieri facias had been sued out; and, to prove the petitioning creditor's debt, they called the petitioning creditor. His evidence was objected to, but was received by Lord Abinger, subject to a motion in the Court of Exchequer; and that Court afterwards intimated an opinion that the evidence was properly received.

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Platt.—This case is very different from that of *Wright v. Lainson*. The sheriff in that case was not indemnified by the assignees, and the counsel for the sheriff, in arguing the case of *Wright v. Lainson*, say that the "trial at law," mentioned in the 13th section of the Bankrupt Act, 6 Geo. 4, c. 16, "cannot mean a trial at law between parties over whom the assignees have no control whatever. It must mean a trial where the assignees are parties, or where the Court directs an issue to try the bankruptcy, where, if the bankruptcy were not proved, it might be made a ground for a petition for a supersedeas." The case of *Wright v. Lainson* went off upon another ground, and on this point Lord Abinger merely says, that, "as at present advised," the Court were with the defendant's counsel.

Lord DENMAN, C. J.—I think that in this case the petitioning creditor is not a competent witness.

Mr. Edward Pontifex was not examined, and other evidence was given of the petitioning creditor's debt.

(a) 2 M. & W. 39.

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On the part of the plaintiff, it was proposed to put in the examination of Mr. Frederick Fraser Carruthers, taken before Sir Fortunatus Dwarrior, one of the Masters of the Court, pursuant to a rule of Court of the 5th of June, 1841 (a).

To let in this evidence, Mr. Edward Paterson was called; he said, "I saw Mr. F. F. Carruthers on board the ship *Diomede*, which was bound for Montreal. I left him on board that ship at three o'clock yesterday afternoon; he had his luggage on board. I saw the ship as late as seven yesterday evening, at between half and three-quarters of a mile below Gravesend. The vessel was waiting for the captain."

Lord DENMAN, C. J.—I think that this is not sufficient. Evidence should be given to satisfy me that this witness is not within the jurisdiction of this Court at the time of the present trial (b).

The evidence was rejected.

Verdict for the defendants.

Platt and *Hoggins*, for the plaintiff.

Kelly, *Montagu Chambers*, and *Butt*, for the defendants.

[Attornies—*W. Paterson*, and *Bartlett & Beddome*.]

In the ensuing term, *Platt* applied for a new trial, but the Court refused a rule.

(a) For the discussion on that rule, see 10 Law Journ. N. S., Q. B. 364.

(b) By the stat. 1 Will. 4, c. 22, s. 10, it is enacted, "That no examination or deposition to be taken by virtue of this act shall be read in evidence at any trial without the

consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity to attend the

trial; in all or any of which cases the examinations and depositions certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate,

be received and read in evidence, saving all just exceptions." See the cases of *Kay, Bart. v. Brookman*, 3 C. & P. 555; *Wyatt v. Bateman*, 7 C. & P. 586; and *Doe d. Beard v. Powell*, 7 C. & P. 617.

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MALICIOUS PROSECUTION.—The first count of the declaration, which was in the usual form, charged the defendant with having maliciously prosecuted the plaintiff on a charge of felony, under the stat. 7 & 8 Geo. 4, c. 29, s. 45, in stealing fixtures let to him. The second count alleged that the plaintiff occupied certain premises as tenant to the defendant, and carried on therein the business of a smith and machinist; that more than a month before the making of the charge the plaintiff had removed certain sheds by the leave and license of the defendant; and that, *whilst the plaintiff occupied the premises as tenant, and more than a month after the sheds were removed*, the defendant maliciously, and without reasonable or probable cause, charged the plaintiff with having wilfully damaged the premises by pulling down the sheds, and upon such charge caused and procured P. Bingham, Esq., a magistrate, wrongfully and illegally to adjudge the plaintiff to pay a sum of money, which he having refused to pay, the defendant caused and procured the magistrate wrongfully and illegally to commit the plaintiff to the House of Correction, where he remained until he was afterwards discharged by the Queen's warrant (a). The defendant pleaded not guilty, and other pleas on which no question arose.

Where a landlord, during the existence of a tenancy, charged his tenant, under the 2 & 3 Vict. c. 71, s. 38, (the Police Court Act), with having *three months* before wilfully damaged his premises:—*Held*, that the magistrate had no jurisdiction, and that the charge should have been made within one month.

In an action by a tenant against his landlord for a malicious charge of felony, under the stat. 7 & 8 Geo. 4, c. 29, s. 45, for stealing fixtures let to him, it is not necessary to give a notice of action under the 75th section of the stat. 7 & 8 Geo. 4, c. 29,

(the Larceny Consolidation Act).

Quere, Whether an action for a malicious prosecution can be maintained where the party charged has been illegally convicted by a magistrate who had no jurisdiction to entertain the charge?

(a) As the form of the second joined it.

count of the declaration may be *Second Count.*—That the plaintiff, before and at the time of the useful in practice we have sub-

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It appeared that the defendant had let to the plaintiff certain premises, situate in Booth-street; and that, the

committing of the grievance hereinafter next mentioned, occupied a certain house and premises situate and being in Booth-street, in the parish of Christchurch, in the county of Middlesex, as tenant thereof, and then exercised and carried on therein the trade and business of a smith and machinist; and the plaintiff whilst he so occupied the said house and premises as aforesaid, and more than one calendar month next before the making of the charge hereinafter mentioned, had, by and with the leave and license of the defendant to him the plaintiff for that purpose granted, pulled down and removed two sheds, the same being inconvenient and inconvenient in the exercise of the plaintiff's said trade and business; yet the defendant well knowing the premises, but further contriving and maliciously intending to injure the plaintiff in his said good name, fame and credit, and to bring him into public scandal, infamy and disgrace, and to cause the plaintiff to undergo the pains and penalties by the laws of this country made and provided against tenants who should wilfully or maliciously damage the premises which they might occupy, and to impoverish, oppress, and wholly ruin him the plaintiff; and heretofore, and whilst the plaintiff occupied the said premises as tenant thereof, and more than one calendar month next after the said sheds were so pulled down and removed as aforesaid, to wit, on the said 6th day of November, in the year of our Lord 1840, aforesaid,

under colour and pretence of a just and lawful complaint, wrongfully, falsely, maliciously and unjustly, and without any reasonable or probable cause whatsoever, and after such leave and license had been so granted by the defendant to him the plaintiff, as aforesaid, caused and procured the plaintiff to be arrested by his body, and held and detained in custody before the said Peregrine Bingham, Esq., so being such police magistrate, and so then sitting as aforesaid; and then before the said Peregrine Bingham, Esq., under the said colour and pretence, and after such leave and license had been so granted as aforesaid, and well knowing that the said sheds had been removed more than one calendar month next before, then falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the plaintiff, for that he the plaintiff, being, on the 4th day of August, in the year aforesaid, and then still the occupier of the said house and premises as tenant thereof, did, on the 4th day of August in the year aforesaid, wilfully damage the said premises by then and there breaking and pulling down the said two sheds; and upon such charge the defendant wrongfully, falsely and maliciously, and without any reasonable cause whatsoever, and after such leave and license had been so granted as aforesaid, caused and procured the said Peregrine Bingham, Esq., so being such police magistrate as aforesaid, wrongfully and illegally to adjudge the plaintiff to forfeit and pay a large sum

rent being in arrear, the defendant, on the 14th of October, 1840, came upon the premises with a broker, for the

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of money, to wit, the sum of £15. And the plaintiff further saith, that he the plaintiff having refused to pay the said sum of £15, the defendant, then, to wit, on the day and year last aforesaid, wrongfully, falsely, and maliciously, and without any reasonable or probable cause whatsoever, and after such leave and license had been so granted as aforesaid, caused and procured Peregrine Bingham, Esq., so being such magistrate as aforesaid, wrongfully and illegally to order and adjudge the plaintiff to be committed to the House of Correction in Clerkenwell, in the county of Middlesex, there to remain for the space of three calendar months, unless the said sum should be sooner paid. And the plaintiff further saith, that such proceedings were thereupon had, that afterwards, to wit, on the said 6th day of November, in the year of our Lord 1840, aforesaid, by a certain warrant under the hand and seal of the said Peregrine Bingham, Esq., he the plaintiff was, in pursuance of such last mentioned wrongful and illegal order and adjudication, committed to the custody of the Governor of the said House of Correction, and remained and continued in his custody there from thence continually, until afterwards, to wit, on the 18th of December in the year aforesaid, when, by a certain other warrant under the hand and seal of our Lady the Queen, directed to the said Governor of the said House of Correction, and bearing date the day and year last aforesaid, whereby, after reciting (amongst other things) that

the plaintiff stood committed to the said House of Correction for the said county for three months, in default of paying the said fine of £15, our said Lady the Queen thereby willed, and her pleasure was, that the said Governor should cause the plaintiff to be forthwith discharged out of custody, and he the plaintiff was then, to wit, on the 24th of December in the year last aforesaid, accordingly discharged out of the custody of the said Governor; and the said last-mentioned complaint and prosecution then became and was and is wholly ended and determined. By means of which said several premises the plaintiff hath been and is greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, inasmuch as divers of those neighbours and subjects to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed, and still do suspect and believe, that the plaintiff hath been and is guilty of the offence and offences hereinbefore mentioned; and also he the plaintiff hath, by means of the premises, suffered great anxiety and pain of body and mind, and hath been forced and obliged to pay, lay out, and expend, and hath laid out and expended divers large sums of money, and hath incurred great costs and expenses, and become liable to divers other large sums of money, in the whole amounting to a large sum of money,

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purpose of levying a distress; and that the defendant and the broker pulled down a punching-engine used by the plaintiff in his trade, and seized and removed fixtures, and committed other irregularities. The plaintiff told the defendant that he should bring an action against him, upon which the defendant replied, that if the plaintiff entered an action against him he would charge him with felony. It further appeared, that, between two and three o'clock in the afternoon of the 5th of November following, the defendant was served with a declaration in an action of trespass at the suit of the plaintiff, and on the evening of the same day the defendant gave the plaintiff into the custody of a policeman upon a charge of feloniously stealing a quantity of building materials; and that the plaintiff was taken to a police station-house, where he remained all night, and on the following morning he was brought before P. Bingham, Esq., at Worship-street Police Court, where the defendant attended and renewed his charge against the plaintiff of stealing the building materials. It further appeared, that the materials alluded to were those which formed some sheds removed by the plaintiff about three months before, and which, as he contended, were taken down with the permission of the defendant. The magistrate, after hearing the evidence and referring to the stat. 7 & 8 Geo. 4, c. 29, s. 45, (the Larceny Consolidation Act), was of opinion that the charge of felony, in removing fixtures let to a tenant, could not be sustained; and the defendant then charged the plaintiff, under the Police Court Act,

to wit, the sum of £200, in and about the defending himself in the premises, and in and about the procuring his discharge from the said imprisonment, and also by reason of the premises been hindered and prevented from exercising and carrying on his said trade and business, and from following and transacting his lawful and ne-

cessary affairs, for a long space of time, to wit, for the space of ten weeks, and thereby lost and been deprived of divers great gains and profits, which he might, and otherwise would, have obtained and acquired; and also by means of the premises the plaintiff hath been and is otherwise greatly injured and damaged.

2 & 3 Vict. c. 71, s. 38, with having wilfully damaged the premises by removing the sheds. Upon this charge the magistrate convicted the defendant, and he was committed to the House of Correction, where he remained for more than a week, when, upon a representation of the facts to the Secretary of State for the Home Department, the plaintiff was discharged by a warrant under her Majesty's royal sign manual.

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Thesiger, for the defendant.—I submit that the plaintiff must be nonsuited—First, with respect to the charge of felony: it appears that the charge was made by a landlord against his tenant, under the 45th section of the 7 & 8 Geo. 4, c. 29, and as the taking of these building materials would not have been an offence at common law, but depends entirely upon the provisions of that statute, the defendant was entitled to notice of action, under the 75th section of the act. Secondly, it appears, on the face of the second count, that the plaintiff was actually convicted by the magistrate of having committed wilful damage to the premises; and having been convicted he cannot maintain any action upon that charge.

Platt, for the plaintiff.—The 45th section of the 7 & 8 Geo. 4, c. 29, only applies to persons acting *in the execution* of that act, and requires notice only where the action is commenced for any thing done *in pursuance* thereof. Here the ground of complaint is, not that the defendant acted under the provisions of that act, but that he maliciously made a charge without any foundation for it.

Lord DENMAN, C. J.—I do not think a notice of action was necessary (*a*).

Platt.—With respect to the other objection, it appears by the second count of the declaration, that the magistrate

(*a*) See the cases of *Brooker v. Field*, 9 C. & P. 651, and *Home v. Grimble*, post, p. 17.

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acted without jurisdiction, and that the conviction was illegal; and there is no authority to shew that in such case an action may not be maintained (a). The 38th section of the statute 2 & 3 Vict. c. 71, enacts, "That every person who *shall* occupy, or *shall have* occupied, any house or lodging within the metropolitan police district, as tenant thereof, and who shall wilfully or maliciously do any damage to the premises, or to any furniture thereof, not being the property of such tenant or occupier, shall, upon complaint made to one of the said magistrates within one calendar month next after the commission of the offence, or the end of the tenancy or occupation, forfeit and pay such sum of money as shall appear to the magistrate to be a reasonable compensation for the damage done, not more than the sum of fifteen pounds, to be paid to the landlord or party aggrieved." That section must be construed *reddendo singula singulis*; and where the tenant is in actual occupation of the premises, the charge must be made within one month from the commission of the offence: the other alternative only applies to cases where the tenancy is determined. In the present

(a) In the case of *Goslin v. Wilcock*, 2 Wils. 302, it was held, that an action on the case would lie for maliciously suing the plaintiff in an inferior court, and maliciously arresting him in that suit when the Court had no jurisdiction of the cause. In that case it appeared that the plaintiff and defendant both lived at Taunton, and that the plaintiff owed the defendant about £5, and that the defendant caused the plaintiff to be arrested for this sum at Bridgewater, on process from the Bridgewater Court of Record. It was admitted that the defendant discontinued his suit in the Bridgewater Court as soon as he discovered that his action would not lie there,

and that he had brought another action for his debt, in which he recovered at the assizes. Evidence of malice was given, and the plaintiff had a verdict, with which Mr. Justice *Aston* (who tried the cause), was satisfied; and the Court of Common Pleas would not grant a new trial; and Lord *Camden* said, "Malice, and that it was without any probable cause, must be alleged and proved. Upon more mature consideration we are all now of opinion, that if you hold a man to bail in an inferior court, when you know it hath not jurisdiction, and with malice, an action upon the case will lie."

instance the tenancy still exists, and the charge was made three months after the alleged damage was done, so that the magistrate was wholly without jurisdiction.

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Thesiger, in reply, contended, that the landlord had until a month after the tenancy expired to prefer his charge.

LORD DENMAN, C. J., (in summing up).—I am of opinion that the magistrate had no jurisdiction under the 2 & 3 Vict. c. 74, s. 38. Where there is an existing tenancy, and the landlord knows of the damage being done, he should prefer his charge within one month. It never could have been intended by the legislature, that a landlord, knowing of damage done to his premises, should be at liberty to make his charge at any time during the continuance of a long lease, and until one month afterwards. Here the tenancy still continues, and the defendant charges the plaintiff with having done the damage three months before. It seems to me, that this is not a case within the statute, and that the magistrate acted without jurisdiction.

Verdict for plaintiff on first count, damages 40s. ;
for defendant on the second count.

Platt, Byles, and Hurlstone, for plaintiff.

Thesiger, Ball, and Bramwell, for defendant.

[Attornies—*J. B. Wathen*, and *T. R. Thompson*.]

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First Sitting at Westminster in Michaelmas Term, 1841.

BEFORE MR. JUSTICE PATTESON.

MOFFAT v. EDWARDS and Another.

Nov. 4.

A paper was in the following form, "I, R. J. M., owe Mrs. E. the sum of £6, which is to be paid by instalments, for rent. (Signed) R. J. M.:"—*Held*, not to be a promissory note, as no time was stipulated for the payment of the instalments.

CASE.—The first count of the declaration stated that the plaintiff was indebted to the defendant, Mrs. Edwards, in the sum of £4, for rent, and that the defendants distrained for more rent than was due. Second count for an excessive distress.—Plea, not guilty, "by statute."

On the part of the defendant, a paper in the hand-writing of the plaintiff was offered in evidence. It was not stamped. It was as follows:—

"I, R. J. Moffat, owe Mrs. Edwards the sum of £6, which is to be paid by instalments, for rent.

R. J. MOFFAT."

Platt, for the plaintiff, objected that this was a promissory note, and that it could not be given in evidence, as it did not bear a promissory note stamp. He cited the case of *Ellis v. Mason (a)*.

(a) 7 Dowl. P. C. 598. In that case a paper, in the following form, was offered in evidence:—

"John Mason, 14th Feb. 1836, borrowed of Mary Ann Mason, his sister, the sum of £14, in cash, as per loan, in promise of payment of which I am truly thankful for; it shall never be forgotten by me, John Mason, your affectionate brother. £14."

Mr. Justice *Williams* held, that this was a promissory note, and that it could not be received in evidence as it was not stamped as such.

In the case of *Brooks v. Elkins*, 2 M. & W. 74, it was held by the Court of Exchequer, that no particular form of words is necessary to constitute a promissory note, and that a paper in the following form, "11th October, 1831.

"I. O. U. £20, to be paid on the 22nd instant,

"W. Brooks,"

requires a stamp, either as a promissory note, or as an agreement for the payment of money above the value of £10.

In the case of *Wheatley v. Wil-*

PATTESON, J.—It is not a promissory note, for although it states the money to be payable by instalments, it does not specify any particular time of payment.

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The paper was read in evidence.

Verdict for the defendants.

Platt and *E. James*, for the plaintiff.

Kelly and *Petersdorff*, for the defendants.

[Attornies—*H. Ashley*, and *Ripingham*.]

Sams, 1 M. & W. 533, a paper in the following form was held to be a promissory note:

"Gentlemen—I have received the imperfect book, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.* 0*d.*, which sum I will

pay you within two years from this date. I am, Gentlemen, your obedient servant,

"THEO. WILLIAMS."

"To Messrs. Stewart, Wheatley, and Adlard, Piccadilly."

"Dec. 18, 1827."

Sittings at Westminster after Michaelmas Term, 1841.

BEFORE LORD DENMAN, C. J.

HOME v. GRIMBLE and HUGGINS.

Nov. 29.

FALSE imprisonment.—Plea, not guilty "by statutes."

A. had communicated to B. & Co., who were distillers, a method of rectifying spirits, and they were

It was opened by *Thesiger*, for the plaintiff, that the plaintiff having discovered a process for the rectification and purification of grain spirit, which imparted to it the re-

to pay him an annuity, and 6*d.* a gallon on all spirits rectified by his method, and to keep an account. A. having a sum due to him, B. & Co. offered to pay it at their solicitor's office, and to produce the account there. A. sent B. & Co. a letter, stating that he should come to the distillery for a sight of the account, and for payment; to which G., one of the firm of B. & Co., replied by letter, stating, that if A. came to the distillery and either rang or knocked, he would be punished, &c. A. went to the distillery (which was within the Metropolitan Police district), and gently rang the gate bell, when H., who was the cashier of the firm, gave A. into the custody of a policeman on a charge of having rung the bell, contrary to the 54th section of the Police Act, 2 & 3 Vict. c. 47.

Held, in an action for false imprisonment by A. against G. and H., that this was not a case within that act, and that G. and H. were not justified under that act, and that they were not entitled to notice of action.

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semblance of French or Cognac brandy, the plaintiff had communicated his process to Sir F. Booth & Co., who, by sealed articles of agreement, dated in the month of July, 1835, agreed to pay him an annuity of £150 a year, and 6*d.* a gallon on all spirits to which this method was applied; and it was agreed, that Sir F. Booth & Co. should keep an account of all spirits sent out by them, to which the plaintiff's process should be applied, and that the book containing this account should be open to the inspection of the plaintiff. By a subsequent agreement entered into in the month of August, 1836, the annuity was raised to £300 a-year, and down to the year 1838, the plaintiff was allowed to inspect the book at the distillery in Albany Street; but in consequence of some differences which had occurred, the firm of Sir F. Booth & Co. wished the plaintiff to see the book at the office of their solicitor. To this the plaintiff would not accede, and he wrote to inform Sir F. Booth & Co. that he should come to the distillery to see the book; however, before he did so, he received a letter signed by the firm, but in the handwriting of the defendant Mr. Grimble, who was one of the partners, that if he came, and either rang the bell or knocked at the door, he would be punished. It would be proved, that the plaintiff went to the distillery of Sir F. Booth & Co., and rang the gate bell, when he was given into the custody of a policeman by the defendant, Mr. Huggins, (who was the cashier of Sir F. Booth & Co.,) on a charge of having created a disturbance by ringing the bell, contrary to the 54th section of the Police Act, 2 & 3 Vict. c. 47 (a); and the plaintiff was taken by the policeman before

(a) By which it is enacted, "That every person shall be liable to a penalty, not more than 40*s.*, who, within the limits of the Metropolitan Police district, shall in any thoroughfare or public place commit any of the following offences:—" one of which is, "16. Every per-

son who shall wilfully and wantonly disturb any inhabitant by pulling or ringing any door bell, or knocking at any door without lawful excuse, or who shall wilfully and unlawfully extinguish the light of any lamp."

Mr. Hardwicke, the sitting magistrate at the Marylebone Police Court, who dismissed the case.

On the part of the plaintiff Mr. William Jacobs was called:—he said, “On the 22nd of April, 1841, I went with the plaintiff to the distillery of Sir Felix Booth & Co., in Albany Street; the plaintiff walked gently to the gate bell and pulled it once, a little boy came and went into the counting-house; the defendant Huggins, who is one of the clerks, came out and told the plaintiff to go away directly, or he should call a policeman; the plaintiff said he came for payment of the quarterly account and inspection of the books; the defendant Huggins went across to a policeman whom I had before observed, and said, ‘I give this person in charge—Policeman, do your duty.’ The policeman said, ‘I have seen no disturbance.’ Mr. Huggins replied, ‘Do your duty, or I will report you.’ We went to the station-house, and the policeman with us; Mr. Huggins came there; the inspector, after hearing all that Mr. Huggins had to say, said, ‘that he thought it did not amount to a charge;’ Mr. Huggins pressed the charge, and it was taken down; Mr. Huggins said, that he wished the annoyance to be put a stop to, and to have it settled before a magistrate.”

The charge sheet was put in, and the charge contained in it was as follows:—“Creating a disturbance at Sir F. Booth’s distillery, in Upper Albany Street, and ringing the bell.”

The deposition of Mr. Huggins before Mr. Hardwicke, the magistrate, before whom the charge was heard and dismissed, was also put in. In his deposition Mr. Huggins stated, *inter alia*, that he knew the plaintiff, and that the plaintiff had claims on the firm.

On the part of the plaintiff the following letter was put in:—

“*Albany Street, 17th April, 1841.*

“We beg to inform you that the sent-out book will be at Messrs. Tilson & Co.’s, 29, Coleman Street, City,

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on Tuesday morning next, the 20th instant, when, on your giving these gentlemen a receipt for the amount due to you to the 19th instant, our draft will be handed to you.

"We are, &c.,

"*To David Home, Esq.*"

"FELIX BOOTH & Co."

To this letter the plaintiff sent a reply, dated the 19th of April, 1841, asking for a particular account of the spirits sent out, and adding, "I do not give up my right to see the books at the works, and to make extracts therefrom, under the sanction of the deed." To this letter Sir F. Booth & Co. replied by a letter of the same date, stating that a sum of 261*l.* 10*s.* was due to the plaintiff, and that their draft for that amount was left with Messrs. Tilson. Two letters from the plaintiff to Sir F. Booth & Co., of the 20th of April, were also put in. In the first of these letters the plaintiff asked for a copy of the account, and in the other of them, after stating that no reply had reached him in answer to his former letter, and that Sir F. Booth & Co. were bound to keep and submit the book to his use in Albany Street, the plaintiff went on to say, "I hereby give you notice that I shall call at Albany Street, at twelve o'clock to-morrow, the 22nd instant, to exercise this right, and renew my other claims, as well as to receive payment of the monies due to me for brandies for the last quarter's sales."

The following answer to this letter was put in. It was in the handwriting of the defendant Mr. Grimble, in whose handwriting the other letters, signed "Felix Booth & Co.," were admitted to be.

"*Cognac Brandy Distillery, Albany Street,
 Regent's Park, 21st April, 1841.*"

"Sir,—We hereby give you notice, and warn you, that any application for monies, or supposed rights or claims, at our premises in Albany Street, according to your letter of this day, either by ringing the bells or knocking at doors

for admission into our works, will be considered as a trespass, and punished accordingly; and we hereby further warn you, that any noise, nuisance, or interruption to our business will be resented or resisted in such a manner as will deter you from such an application for the future. We again request that all applications may be made through our solicitor, as no communication of any kind whatever will be held with you.

“ We are, &c.

“ FELIX BOOTH & Co.”

“ To David Home, Esq.”

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F. Pollock, A. G., for the defendants.—I submit, that, even if a creditor, whose claim is undoubtedly founded in justice, assert that claim, either by knocking at the door, or ringing the bell, in such a manner as to disturb the debtor in the peaceable possession of his house, he is within the provisions of the act of parliament; and the domiciliary visits of a person like the plaintiff, made in the manner in which this was, are the very sort of things which this provision in the Police Act was meant to prevent. If the plaintiff had any claim on the firm of Sir F. Booth & Co. for an account, his proper remedy was by filing a bill in Chancery against them. But whether that be so or not and even assuming that the plaintiff was not liable under the Police Act, the present action cannot be maintained against the defendants, as they *bonâ fide* considered themselves to be acting under the provisions of that act, and are entitled to notice of action by the 41st section of the stat. 10 Geo. 4, c. 44, which is, by the 79th section of the stat. 2 & 3 Vict. c. 47, incorporated with the provisions of the latter statute.

LORD DENMAN, C. J., (in summing up).—It is my opinion that the defendants, under this act of Parliament, had no authority to imprison the plaintiff. I shall not submit to you the question, whether the defendants acted *bonâ fide*, as the question really is, what damages the

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plaintiff is entitled to ; and I am of opinion that no notice of action was necessary (a), and that the defendants had no justification whatever under the Police Act for infringing as they have done the liberty of their fellow-subject. It is a mere abuse of language to say, that this act of parliament has any reference to a case like the present. If the defendants really thought that the plaintiff was a trespasser in coming to the distillery, why not bring an action of trespass against him, instead of asking, as the learned Attorney-General has done, that the plaintiff should file his bill in equity against Sir Felix Booth & Co. for an account. I do not mean to say, that there may not possibly be cases where a person, by his obstinacy in ringing at a bell or knocking at a door, for the avowed purpose of enforcing a legal right, may not expose himself to the punishment which this act of parliament has provided for such offences ; but the facts in the present case are not of a nature which can, with any regard to either law or common sense, be brought within the operation of this statute. The learned Attorney-General has complained of the domiciliary visits of the plaintiff to the establishment of Sir Felix Booth, and has said that this act of parliament was passed for their prevention ; however, I must say, that I think that, if the very great powers which are undoubtedly given to the police by this act of parliament were extended to cases like the present, the result would be domiciliary visits of another and much more dangerous description. There is another provision in this very act of parliament, by which the police are authorized to receive into their custody any person who has used insulting language to another. Now, if the plaintiff had given either of the defendants into custody, because that defendant had written a letter to the plaintiff, in which he said that he would hold no personal intercourse with the plaintiff, that charge would

(a) See the case of *Brooker v. Field*, 9 C. & P. 651, and *Dowell v. Benningfield*, ante, p. 9.

have been just as much authorized by the act of parliament as the charge which the defendant Mr. Huggins made against the plaintiff; and I think I need not go further to shew what would be the consequences that would result from the construction sought to be put on the act of parliament by the defendants. Your verdict ought to be for the plaintiff, with such moderate damages as you think the circumstances of the case fairly and properly require.

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Verdict for the plaintiff, damages £20.

Thesiger and *G. T. White*, for the plaintiff.

F. Pollock, *A. G.*, *Crowder*, and *Bovill*, for the defendants.

[Attornies—*Monkhouse*, and *Tilson & Co.*]

BEFORE MR. JUSTICE WIGHTMAN,

(*Who sat for the Lord Chief Justice.*)

PRICE, Bart., and Others, v. SEAWARD and Another.

Dec. 7.

TRESPASS for breaking and entering the plaintiffs' close, and for taking away tar and turpentine. Pleas, 1st, To the whole declaration, not guilty. And as to the breaking of the close; 2nd, A plea of a public way; 3rd, A plea of a private way, and a user of it for twenty years;

In an action of trespass to land the defendants pleaded not guilty, and a right of way. The plaintiff replied de injuriâ to the

plea of the right of way; and newly assigned, that the trespasses were committed "on other and different occasions," than that in the second plea mentioned. The defendants pleaded to the new assignment a payment of money into Court, and by this plea relinquished and abandoned so much of the general issue "as *traverses* or denies, or can be deemed or construed to traverse or deny the said trespasses newly assigned, or any part thereof." Replication to this plea, accepting the sum paid into Court, "in full satisfaction and discharge of the said several trespasses above newly assigned."

Held, that, as the plea of not guilty was not entirely withdrawn, the plaintiff had the right to begin; and that, if in a case like this the defendant wished to begin, he should take out a summons, and, by a judge's order, withdraw the general issue entirely from the record.

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4th, A plea of a private way granted by a lost grant. As to the taking of the turpentine and tar, 5th, That it was encumbering the defendants' close, and that they removed it; 6th, That the plaintiffs assaulted the defendants and their servants, and rolled the barrels containing the turpentine and tar against them, and that the defendants removed them in self-defence; 7th, The like, only stating that the trespass was committed in defence of the defendants' servants.—Replication, taking issue on all the special pleas, and new assigning separately upon each special plea, that the trespasses were committed "on other and different occasions, and for other and different purposes than in that plea mentioned." To the new assignments the defendants pleaded a payment of £25 into Court, and that the plaintiffs had not sustained greater damages; and this plea then went on as follows:—"And the defendants fully relinquish and *abandon so much of their said first plea* by them above pleaded *as traverses or denies*, or can be deemed or construed to traverse or deny, *the said trespasses newly assigned, or any part thereof*, or that the plaintiffs have sustained damage in respect thereof." Replication to the plea to the new assignments, "that the plaintiffs accept and take out of court the said sum of £25, *in full satisfaction and discharge of the said several trespasses above newly assigned*. Therefore, as to such last-mentioned trespasses, the plaintiffs are satisfied, and they pray judgment for their costs and charges by them sustained in this behalf."

F. Pollock, A. G., for the defendants.—I submit that on these pleadings the defendants are entitled to begin. The plaintiffs having accepted the amount paid into court on the new assignments, there can be no question of damages. The justifications set up by the pleas are the only matters in question.

Hoggins on the same side.—In the case of *De Beauvoir v. Rhodes*, in which the pleadings were very similar to the

present, the Lord Chief Justice of the Common Pleas decided, that the defendant should begin, on the ground that there was nothing in question but rights, the burden of proof of which lay on the defendant.

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Thesiger for the plaintiffs.—The plea of the general issue is not wholly withdrawn. The defendants only withdraw so much of the plea of not guilty as relates to the trespasses newly assigned; which trespasses newly assigned are alleged to have been committed on other and different occasions than those mentioned in the special pleas.

WIGHTMAN, J.—I am of opinion, that the plaintiffs must begin. If there had been no new assignment the plaintiffs would clearly have begun, because of the general issue. The new assignment is for trespasses on other and different occasions than those mentioned in the special pleas; and the defendants, as to those trespasses committed on other and different occasions, withdraw their plea of the general issue, but they do not withdraw their plea of the general issue entirely. It would save a great deal of discussion if the defendants, in cases like the present, would take out a summons, and by a Judge's order withdraw the plea of the general issue entirely from the record, and then there could be no doubt as to their right to begin (a).

Thesiger, for the plaintiffs, opened their case.

The cause was referred.

Thesiger, *Knowles*, and *H. Hill*, for the plaintiffs.

F. Pollock, *A. G.*, *Jervis*, and *Hoggins*, for the defendants.

[Attornies—*Beck*, and *J. & C. Rogers*.]

(a) In the case of *Pontifex v. Jolly*, 9 C. & P. 202, it was held, that the defendant's counsel at the trial, offering to admit that the plaintiff was entitled to a verdict on the is-

ssues the proof of which lay on the plaintiff, would not entitle the defendant to begin on the issues the proof of which lay on the defendant.

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Sittings in London after Michaelmas Term, 1841.

BEFORE LORD DENMAN, C. J.

BILLING v. RIES.

Dec. 11.

A. on Tuesday, the 17th of November, asked B. to give him change for a check for 10*l.* 10*s.*, drawn by C. on W. & Co., bankers. B. did so, and kept the check till the following Saturday, when he paid it to his bankers. On Monday the 23rd, W. & Co. stopped payment, and the check was not paid by them. On the evening of that day B. told A. that the check had been "returned," not telling A. that W. & Co. had stopped payment, a fact which A. did not know. A. gave B. £5., and an I. O. U. for 5*l.* 10*s.*, and took back the check. It was proved that C. had funds in the hands of W. & Co.:—*Held*, that the suppression of the fact by B. that W. & Co. had stopped payment, and the statement by him that the check had been "returned," amounted to such a fraud upon A. as would entitle him to recover back the £5, in an action for money had and received; and that, to entitle him to do so, it was not necessary that he should have given or tendered back the check to B.

DEBT for money had and received, with a count upon an account stated.—Plea, *nunquam indebitatus*.

It appeared, that, on the evening of Tuesday the 17th of November, the plaintiff asked the defendant to give him cash for a check drawn by the plaintiff's brother on Messrs. Wright the bankers of Henrietta Street, Covent Garden, for 10*l.* 10*s.*, and that the defendant did so; and it was proved by a witness named Lock that he saw the defendant, on the evening of Monday, the 23rd of November, when the defendant said to him—"Billing is in a great passion; I changed a check for him in the early part of last week, and I paid it into my bankers' last Saturday (November 21st); when he came in this evening, I said, 'Your check is returned,' and he gave me £5 and an I. O. U. for 5*l.* 10*s.*; I then told him Wright's bank had stopped payment, and he was angry." This witness also stated, that he told the defendant that he ought not to have concealed the fact, that the banking-house had stopped payment. It was proved by another witness, that the defendant told him that he had kept the check some days, and that it was not paid because the bank had stopped, and that he had got the money afterwards of the plaintiff. It was also proved by the plaintiff's brother, who was the drawer of the check, that, on the 17th of November, he had funds to the amount of £250 in the hands of Messrs. Wright, and that he continued to have funds in their

hands till they stopped payment; and he stated, in cross-examination, that 5s. in the pound had been paid under the bankruptcy of Messrs. Wright, and that the check in question had been in his possession since the 24th of November, but that he had not proved for it under the bankruptcy of Messrs. Wright.

The following letters from the plaintiff's attorney to the defendant, and from the defendant's attorney in answer, were put in:—

" Sir,—I am instructed, by Mr. Sidney Billing, to apply to you for the return of the £5, which you yesterday received from him, under circumstances which it is unnecessary for me to enter into, and also for the return of a piece of paper, on which is written the words and figures 'I. O. U. 5*l.* 10*s.*, Sidney Billing, the 23rd November, 1840;' and you will consider this letter, as it is intended, as a demand for the piece of paper or I. O. U.; and unless you pay the amount, and deliver up the paper to the bearer, I shall immediately commence proceedings against you.

" I am yours obediently,

" *To Mr. Solomon Ries,*

" J. BILLING."

" *Cigar Divan, Strand.*

" 33, King St., Cheapside,

" 24th Nov. 1840."

" 7, Liverpool Street, Broad Street,

" 1st Dec., 1840.

Sir,—Mr. Samuel Ries has put your letter to him in my hands, with instructions to appear to any process that you may think proper to issue against him; and also, that if the 5*l.* 10*s.* owing to him from Mr. Sidney Billing be not immediately paid, to proceed against him for the recovery thereof without delay.

" I am, Sir, your obedient servant,

" *To Mr. John Billing.*"

" E. J. SYDNEY."

Jervis, for the defendant.—I submit, that this action is

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not maintainable, and that the plaintiff must be nonsuited. This is an action for money had and received; and if, in the present case, an action were maintainable at all, the declaration should have been special, and in deceit. A plaintiff can only recover in an action for money had and received, if he be equitably entitled to the money, and has put the opposite party into the same situation that he was in before. The proper course for the plaintiff to have taken before bringing this action, would have been to have returned the check to the defendant. By not doing so, the defendant is deprived of the power of proving for its amount under Wright's bankruptcy. The drawer of the check omitting to prove for it will not suffice; and it is no answer to my objection, to say, that, after judgment in this case, the check will be given up; and so far from the plaintiff having given up the check to the defendant, his attorney does not even offer to do it, when he demands the £5 and the return of the I. O. U.

Lord DENMAN, C. J.—I think that if the facts of the case remain unaltered, the plaintiff will be entitled to recover in this action.

Jervis addressed the jury for the defendant.—The holder of a check has a right to look to the person from whom he received it, if it is not paid at the banker's; and by not presenting it in time, he is in no different situation from that of the indorsee of a bill of exchange, who has given time to the acceptor. Now, if the holder of a bill of exchange, which was dishonoured, applied to the drawer for payment, and was paid the amount of the bill by the drawer—could it be contended, that the drawer could recover his money back from the holder, because the holder did not tell the drawer that he had given time to the acceptor? A person, who pays money under such circumstances, is bound to inquire before he pays the money, whether any thing has been done to discharge him

from his legal liability: and here the plaintiff, even when he wanted his money back again, never returned the check to the defendant, so as to enable him to prove for the amount under the bankruptcy of Messrs. Wright.

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Lord DENMAN, C. J.—The plaintiff is entitled to a verdict; and I direct the jury, that the defendant's knowing the bank to have stopped payment, and suppressing that fact, and his telling the plaintiff that the check was "returned," is such a suppression of the truth, as, in point of law, constitutes a fraud on the plaintiff. The check was not "returned" in the ordinary acceptance of that term; and I think that, under the circumstances of this case, the defendant was bound to communicate all he knew.

Verdict for the plaintiff for £5.

Erle and Humfrey, for the plaintiff.

Jervis, for the defendant.

[Attornies—*J. Billing*, and *E. J. Sydney*.]

MORRIS and Others v. HANNEN and M'KNEIGHT.

Dec. 11.

DEBT for goods sold, with a count upon an account stated. Pleas, by the defendant Hannen—1st, Nunquam indebitatus; 2nd, Payment by the defendant M'Kneight; 3rd, That the defendants had been partners, and that the debts became due from them as such; that they dissolved their partnership, and that it was agreed that the defendant M'Kneight should pay all debts owing from the firm, and become solely responsible for them; and that the

A notice to produce, served by the defendants on the plaintiffs, giving them notice to produce "all letters written to and received by you between the years 1837 and 1841, both inclusive, by and from the said defendants

or either of them,' during the time aforesaid, or by or to any person on their or your behalf respectively," is good, and is not too general, although it does not specify the date of each particular letter.

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plaintiffs agreed with the defendant M'Kneight and this defendant to discharge, and did then discharge, this defendant from all liability in respect thereof.—Replication to the 3rd plea, that the plaintiffs did not agree with the defendant “to discharge, nor did they discharge, the said defendant Hannen from all liability in respect of the said several debts in the declaration mentioned, or any of them, or any part thereof, in manner and form,” &c. The defendant M'Kneight suffered judgment to go by default.

Lord DENMAN, C. J.—Does the 3rd plea state, that there was any consideration for this agreement.

S. Martin for the plaintiff.—It does not (a).

Evidence was given of the goods being supplied to the defendants during their partnership.

Petersdorff, for the defendant Hannen, referred to the cases of *Thompson v. Percival* (b), and *Hart v. Alexander* (c).

On the part of this defendant, an advertisement in the London Gazette, announcing the dissolution of the partnership of the defendants, was put in (d). It stated the dissolution of the partnership, and that all debts due to or from the late firm should be received and paid by the defendant M'Kneight.

The written agreement entered into between the two defendants, dated the 15th of August, 1839, by which

(a) It seems to be very doubtful whether a plea of this kind, which does not state a consideration, would not be bad, even after verdict, unless it were founded on an instrument under seal.

(b) 5 B. & Ad. 925; 3 N. & M. 167.

(c) 2 M. & W. 484. See also the case of *David v. Elliot*, 7 D. & R. 690.

(d) It was opened that this advertisement could be traced to the knowledge of the plaintiffs.

the partnership was dissolved, was also put in. It contained a stipulation as to debts to the effect above stated.

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Petersdorff called for a letter sent by the defendants to the plaintiffs, dated the 15th of August, 1839.

The notice to produce, given by the defendant's attorney to the plaintiff, was read: it was in the following form:—

“Take notice, that you will be required to produce and shew to the Court and Jury on the trial of this cause, all account books, and books of every description, kept by you relative to your business of spirit merchants, between the years 1837 and 1841, both inclusive; and also all letters written to and received by you during such period by and from the said defendants, or either of them, during the time aforesaid, or by or to any person on their or your behalf respectively.”

Erle, for the plaintiffs.—I submit that the notice to produce is not sufficient, as it does not state the dates of the letters which the plaintiffs are called on to produce.

Lord DENMAN, C. J.—I think it is a good notice to produce.

Secondary evidence was given of the contents of the letter.

There was no evidence that the plaintiffs had ever agreed to discharge the defendant Hannen from his liability, and there was therefore a

Verdict for the plaintiffs.

Erle and *S. Martin*, for the plaintiffs.

Petersdorff and *Lush*, for the defendant Hannen.

[Attornies—*Trehern & White*, and *J. Bishop*.]

1841.

DOE on the Demise of HUMPHREY v. MARTIN.

In ejectment to recover five houses, it was proved that the lessor of the plaintiff had received the rents of some of them for four quarters, and of the others for five quarters, down to March, 1841, and that in that month the lessor of the plaintiff's receiver of rents found the door of one of the houses secured by a chain, and the defendant in it, who said that it was his freehold :—*Held*, that this was evidence to go to the jury on the part of the lessor of the plaintiff; and if there was no evidence given on the part of the defendant, it would be for the jury to consider whether they were satisfied upon this evidence that the property really belonged to the lessor of the plaintiff.

EJECTMENT to recover five houses, being Nos. 1, 2, 3, 4, and 5, in Cock Court, Angel Alley, in the parish of St. Botolph without Bishopsgate. The day of the demise was the 7th of May, 1841.

It was proved by a person named Griffith, that she had occupied the house No. 5, and had paid rent for it to Mr. Bayman, the receiver of rents of the lessor of the plaintiff, and that on her quitting the house in the beginning of the year 1841, she had by the consent of the lessor of the plaintiff let it to a person named Connell; and it was further proved by Mr. Bayman, that in the years 1840 and 1841 he had received the rents of all the five houses for the lessor of the plaintiff, some for four quarters, and the others for five quarters, down to March, 1841.

It was further proved by Mr. Bayman, that, in the month of March, 1841, he found the door of the house No. 5 secured by a chain, when the defendant, who was in the house, told him through a window, that it was his (the defendant's) freehold, and he claimed it under a will, and he referred the witness to Mr. Hembery, his solicitor.

Ball, for the defendant.—If the defendant had come into possession, either under the lessor of the plaintiff or by means of any of the tenants of the lessor of the plaintiff, I admit that the defendant could not put the lessor of the plaintiff on the proof of his title; but here the defendant comes in independently of the lessor of the plaintiff and of his tenants, and he claims the property as his freehold. That being so, the lessor of the plaintiff can only recover by the goodness of his own title; and he cannot, without proving a title in himself, call on the defendant to shew his title. If the lessor of the plaintiff had shewn the receipt of rent by himself for twenty years, that would be evidence of title; but the receipt of rent for four or five

quarters is, as I submit, not sufficient. In ejectment the plaintiff is not entitled to recover by proof of possession as he does in trespass; he can only recover upon proof of a good title.

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Lord DENMAN, C. J., (in summing up).—If the defendant has any title to this property he ought to shew it now. I think that the lessor of the plaintiff has given sufficient evidence for me to leave to you, and you are to consider whether this evidence satisfies you, that the lessor of the plaintiff is the owner of this property. You have had it proved that the lessor of the plaintiff received the rents for four, and, in some instances, five quarters, without interruption; and then the defendant gets into possession, and says the property is his freehold. The defendant gives you no evidence of any right in himself, and, for aught that appears in this case, he is a mere wrong-doer. You are therefore to say, whether you are satisfied by the evidence that this property really belongs to the lessor of the plaintiff.

Verdict for the plaintiff (a).

S. Martin, and *Chadwicke Jones*, for the plaintiff.

Ball, for the defendant.

[Attornies—*Thos. Watts*, and *Hembury*.]

(a) See the cases of *Doe d. and Doe d. Stansbury v. Arkwright*, *Hughes v. Dyball*, 3 C. & P. 610; 5 C. & P. 575.

1841.

BRUNE, Esq., v. THOMPSON.

Dec. 15.

In assumpsit for tolls, a computus of a prepositus or reeve of 33 Hen. 6, which was brought from the muniment room of the lord of the manor, but which was not signed, and of which no evidence of the handwriting could be given, but in which the receiver purported to charge himself with the receipt of money, was offered in evidence:—*Held*, to be receivable.

The plaintiff claimed tolls throughout the port of Padstow:—*Held*, that a record of K. B., of 7 Ric. 2, of a cause removed by certiorari from the maritime court of Aldestowe, was receivable in evidence for the plaintiff, although that cause was an action of trespass for taking a ship, and the present plaintiff and defendant did not claim under either of the parties to it; and evidence was allowed to be given by the witness who produced it, that he had ascertained from records that Aldestowe and Padstow are different names for the same place.

But the opposite counsel will not be allowed to ask him whether he had not found other records besides those given in evidence, which related to the right of the prior of B., from whom the plaintiff traced his title, as that would be giving parol evidence of the contents of those records.

ASSUMPSIT for the tolls of goods passing through a certain manor of the plaintiff, and wharfage in the manor, and for tolls due to the plaintiff as owner of the port of Padstow, with a count for tolls generally.

Plea: as to £10, being the tolls due for passage and wharfage, and on the last count for tolls generally, a plea of payment of £10 into Court, and, as to residue, non assumpsit (a).

Replication: as to the £10, accepting that sum, with a similiter to the non assumpsit.

(a) As the forms of the declaration and plea may be useful in practice, we have subjoined them.

Declaration. — “That the defendant heretofore, to wit, on the 17th day of January, A. D., 1840, was indebted to the plaintiff in £200 for divers reasonable tolls and sums of money due and of right payable from and by the defendant to the plaintiff, to wit, for the passage of divers goods and chattels, wares and merchandizes, over and through a certain manor and certain premises of the plaintiff, at the defendant's request, and by the permission and sufferance of the plaintiff, and for the wharfage and deposit for certain spaces of time then elapsed of the said

goods and chattels, wares and merchandizes, in and upon the said manor and premises of the plaintiff, at the defendant's request, and by the sufferance and permission of the plaintiff.

“And for divers other reasonable tolls and sums of money due and of right payable by and from the defendant to the plaintiff for and in respect of divers tolls and port duties due and of right payable by and from the defendant to the plaintiff, as and being owner of a certain port, to wit, the port of Padstow, in the county of Cornwall, to wit, for and in respect of divers goods, wares, and merchandizes exported and shipped from and out of the said port, at the de-

The real question in the case was, whether the plaintiff, who was the lord of the manor of Padstow, in the county of Cornwall, was entitled to tolls on all goods shipped from the port of Padstow, or imported into that port; or whether his right to toll extended only to the manor of Padstow, the port extending beyond the manor, and the sum paid into Court being the amount due from the defendant to the plaintiff for tolls within the manor only.

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defendant's request, and by the sufferance and permission of the plaintiff.

"And also for and in respect of divers other goods, wares, and merchandises *imported* into and landed and unloaded in and upon the said port, at the defendant's request, and by the sufferance and permission of the plaintiff.

"And for divers other sums of money due and of right payable and renderable by the defendant to the plaintiff, as and being the owner of the said manor, as and for certain other tolls before then due and of right payable and renderable by the defendant to the plaintiff as and being such owner of the said manor.

"And for divers other sums of money due and of right payable and renderable by the defendant to the plaintiff, as and being owner of the said port, as and for and in respect of certain other tolls and port duties before then due and of right payable and renderable by the defendant to the plaintiff, as and being such owner of the said port.

"And for divers other sums of money due and of right payable and renderable by the defendant to the plaintiff, as and for certain other tolls and duties before then

due and of right payable and renderable by the defendant to the plaintiff; and being so indebted, he, the defendant, afterwards, to wit, on the day and year aforesaid, in consideration of the premises respectively, promised the plaintiff to pay him the said several sums of money respectively on request; yet he hath disregarded his promise, and hath not paid the said sums of money, or any or either of them, or any part thereof, to the plaintiff's damage of £200."

Pleas.—"As to the sum of £10 being part of the monies in the declaration mentioned, and therein alleged to be due and payable to the plaintiff for the passage of goods, chattels, wares, and merchandizes, over and through a certain manor and premises of the plaintiff, and for wharfage and deposit of the same in and upon the said manor and premises, and for sums of money due and payable and renderable to the plaintiff, as and being owner of the said manor, as and for certain tolls in the declaration mentioned, and for other sums of money alleged in the last count of the declaration to be due, payable, and renderable to the plaintiff, as and for certain other tolls and duties in the said declaration last above mentioned, the

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The venue in this case had been originally laid in London; but, on the defendant's application to change it into Cornwall, the plaintiff had retained the venue in London upon the usual undertaking to give material evidence in London.

On the part of the plaintiff the enrolment of an inspeximus charter of 3rd Edward the Fourth, produced by Mr. Devon from the Record Office of the Tower of London, was put in. This was an inspeximus and confirmation of several charters granted by Kings John and Edward the First, and by Richard Earl of Poictier and Cornwall, to the prior and canons of Bodmin, with whom the plaintiff commenced his title to the port of Padstow, the plaintiff deducing his title through the grantee of King Henry the Eighth, after the dissolution of the religious houses.

It was proposed on the part of the plaintiff to put in a computus of the prepositus or reeve of Padstow, of the 33rd year of the reign of King Henry the Sixth. This computus was brought from the muniment room of the plaintiff by Mr. Coode, one of the attornies for the plaintiff. It was in Latin, and not signed: the following is a translation of it:—

“ Padstow—The account of Thomas Robyn, reeve there from the feast of St. Michael the Archangel, in the 33rd year of the reign of King Henry the Sixth, unto the same feast next following, in the 34th year, for one whole year.

defendant, by John Brownrigg Gore, his attorney, says, that the plaintiff ought not further to maintain his action in respect thereof, because the defendant now brings into Court the sum of £10 ready to be paid to the plaintiff. And the defendant further says, that the plaintiff has not sustained damages to a greater amount than the said sum of £10, in respect of the causes of action in the introductory part

of this plea mentioned, and this he is ready to verify; wherefore he prays judgment, if the plaintiff ought further to maintain his action thereof. And as to the residue of the said declaration, the defendant says, that he did not promise in manner and form as in the declaration is alleged, and of this he puts himself upon the country, &c.

(Signed) EDW. SMIRKE.”

“ Rents of Assize.

“ The same answers for 20*s.* for the rent of Corgellow, and 7½*d.* for rent at Trenoyow, for a tenement at Padstow, newly built upon the Strond.

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“ Culage of the sea.

“ And for eight shillings received for culage of the sea there this year. Sum, 8*s.*

“ Tithe of mills.

“ And for eight shillings for the tithes of eight mills there this year, and for (a) — received for the customs of the sea there this year. Sum, 8*s.*

“ Decayed rents.

“ Several allowed for tenements at Porth Cronck.

“ Money paid.

“ And allowed to the same 7*s.* paid to the aforesaid receiver, by the hands of Thomas Courteys, for culage of the sea, and for a fee of bushelage there this year; and allowed to the same 12*d.* for default of culage of the sea beyond what was above levied this year; and he oweth 31*s.* 3¼*d.*”

Erle, for the defendant.—I submit that this computus ought not to be received in evidence, it is not signed by the reeve, and there is no proof that it is in his handwriting.

Lord DENMAN, C. J.—I never saw a signature to any of these ancient reeves' accounts, except the name in the heading of the account is so to be considered.

Mr. Devon, in answer to a question of Lord Denman, C. J., stated that ancient accounts of this sort are never signed.

C. Cresswell, for the plaintiff.—This is an account of a

(a) The sum was not legible in the original.

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deceased steward, who makes himself liable to his employer; and these accounts are evidence of title. The account is not signed, but it is proved that ancient documents of this sort never are so; and at this distance of time it is impossible that it should be proved by distinct evidence either that this person was reeve to the prior and canons of Bodmin, or that this account is in his handwriting.

Cockburn, on the same side.—The prior and canons were not entitled to these tolls in their individual capacity, but in their corporate capacity. The corporate body was dissolved, and their rights transferred to the grantee of the crown, under whom we claim; and no one could be better entitled to the custody of this account than the present plaintiff.

Lord DENMAN, C. J.—I think, that, at this distance of time, this document must be taken to be in the reeve's handwriting.

Butt, for the plaintiff, cited the case of *Crease v. Barrett* (a).

Erle.—I am aware, that, in a case in the Exchequer (b), a chartulary of Glastonbury Abbey, which was in the muniment room of the Marquis of Bath, was decided to be in proper custody, as the Marquis of Bath was the grantee of some of the abbey lands; but, as this account is not signed, it may be only a copy.

Lord DENMAN, C. J.—I think, that, under all the circumstances, I must take this document to be an original; and I think, also, that it comes from the proper custody.

(a) 1 C., M. & R. 919. In that case it was held, that the entry of a deceased person, charging himself, is admissible against strangers, even though it appears that the

facts stated in that entry were not known to him of his own knowledge.

(b) The case of *Bullen v. Mitchell*, 2 Price, 399.

An account of this sort would be very likely to be delivered to a purchaser or grantee, the same as a rental would be. I shall receive it in evidence.

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The computus were put in and read (a).

C. Cresswell, for the plaintiff, proposed to give in evidence a record of the Court of King's Bench, of the 7th Richard the Second, being the record of a case of *Osbert Hameley v. John Alweston*, which was removed, by certiorari, from the Maritime Court of Padstow to the Court of King's Bench.

This record was headed, "Pleas before the Lord the King at Westminster, of the Term of the Holy Trinity, in the 7th year of the reign of King Richard the Second, from the Conquest.

R. Tresilian."

It commenced with stating the writ of certiorari (in hæc verba) directed to the "reeve and burgesses of the town of Aldestow," and set out the return to the writ, which stated, that, at the Maritime Court held at Aldestow, Osbert Hameley complained of John Alweston, of a plea of trespass; and that John Alweston was attached, by his ship the *Julian* of Plymouth, of which John Gofayre was master; and that Osbert Hameley counted against him for taking his ship, "The Mary of the port of Padstow," and for carrying away John Gynes, his servant, the master of that vessel, and the anchors, cables, &c. To which John Alweston says nothing, but that he is the owner of only one-half and a moiety of a quarter of another half of the *Julian*. The record went on to state, that Osbert Hameley called witnesses, and was adjudged to recover 200 marks from John Alweston; and the bailiffs of the town were commanded to sell John Alweston's share in the *Julian*. The record went on to state, that afterwards Osbert Hameley, asserting that he was not satisfied, the sheriff of Cornwall

(a) See the cases of *Doe d. Sturt v. Mobbs*, ante, p. 1, and *Doe d. Bodenham v. Colcombe*, post.

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was commanded to summon John Alweston to appear in the King's Bench; but the sheriff returned nil: and the sheriff of Devonshire was commanded to summon John Alweston, and he appeared in the King's Bench, and pleaded that the town of Aldestow is held by the prior of Bodmin, and that the prior hath not cognizance of pleas or the jurisdiction of an Admiralty Court. To this Osbert Hammeley replied, that the reeve and burgesses have jurisdiction "of all pleas to the maritime law belonging," "and this he is ready to verify;" "and because John Alweston refuses the verification aforesaid, he prays judgment and execution." The record then set out continuances, by curia advisare vult, for four terms, when John Alweston came and pleaded the "King's letters patent for the protection and defence of him the aforesaid John, and for all the lands, goods, rents, and all the possessions of the said John," of which letters patent he makes profert, and they were set out verbatim on the record (a), and the record

(a) The following is a translation of the letters patent of protection:—

"Richard, by the grace of God, King of England and France, and Lord of Ireland. To all his bailiffs and faithful persons to whom these present letters shall come, greeting. Know ye, that we have taken in our protection and defence, John Alweston of Plymouth, who is going in our service to the parts of Brittany, and there to continue with our faithful and beloved John de Roches, Knight, captain of the town of Brest, in defence of the castle and town there, and also the men, lands, goods, rents, and all the possessions of the said John Alweston; and therefore, we command you, that you maintain, protect, and defend the same John Alweston, his lands, goods, rents,

and all his possessions, not permitting any one to interfere or meddle with them, to the injury, molestation, damage, or hurt of him; and, if any forfeiture thereof hath been made, without delay cause amendment thereof to be made. In witness whereof, we have caused these our letters to be made patent, and to continue for one year. Also, we will that the same John Alweston, in the mean time, shall be quit of all pleas and complaints, except pleas of dower, unde nil habet, and of quare impedit and assize of novel disseisin, and last presentation and attain, and except the complaints for which he may happen to be summoned before our justices itinerant in their iters. These presents not being the less valid, if it shall happen that he the said John Alweston, &c. there shall

concluded in the following form:—"By pretext of which letters, the plaint aforesaid remains without day."

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Erle, for the defendant.—I submit that this record is no evidence in the present action. It is in a cause between two parties under whom neither of the present parties claim. It is *res inter alios*.

not be taken, or after or since the term aforesaid he shall have returned into England from the parts aforesaid. Witness ourself at Westminster, the 22nd day of January, in the ninth year of our reign."

The law on the subject of protections will be found in Co. Litt. 130. a. et seq.; but Lord Coke says, "of these protections I cannot say any thing of mine own experience, for albeit Queen Elizabeth maintained many wars, yet she granted few or no protections, and her reason was, that he was no fit subject to be employed in her service, that was subject to other men's actions, lest she might be thought to delay justice." Mr. Justice Blackstone, in treating of protections, says (3 Bl. Com. ch. 19), that "King William, in 1692, granted one to Lord Cutts [a distinguished general of that period] to protect him from being outlawed by his tailor, which is the last that appears upon our books." The case is *Barrudale v. Lord Cutts*, 3 Lev. 332; from which it appears, that the counsel for the tailor tried to get rid of the effect of the protection on technical grounds; but they failed in doing so, and the protection was allowed by the Court of Common Pleas. In early times, these letters patent of protection must have been commonly granted, as there is a considerable

number of cases on the subject of them in the Year Books; and "Protection" is a title of some length in Vin. Abr. vol. 18; and under that title, C. 2, a case of Trin. Term, 4 & 5 Philip and Mary, is cited from Jenk. Cent. 213, pl. 52, in which "a prisoner in execution in the Fleet was thought a man very necessary to serve the Queen in her wars; and the Court was moved by the Attorney-General by command of the privy council, whether the Queen might license him with a keeper to go to Berwick to defend it; but all the justices of B. R. and C. B. held, that he could not be dismissed by protection, quia moratur supra salva custodia." There is no doubt that the prerogative of the crown as to protections is unaltered, although, in practice, they are now never granted. It is, however, not unusual in acts of parliament, inflicting a penalty, to take away the defence of a protection; thus, in the stat. 55 Geo. 3, c. 137, s. 6, which imposes a penalty of £100 on any person having the management of the poor contracting to supply the workhouse with goods, it is enacted, that the penalty shall be recovered by action, in which "no *essoign*, *protection*, *wager of law*, or more than one *imparlance* shall be allowed."

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C. Cresswell.—I tender it in evidence to shew, that in the reign of Richard the Second there was a port of Padstow, and that it belonged to the prior of Bodmin.

Lord DENMAN, C. J.—I think I must receive it in evidence.

The record was given in evidence.

Mr. Devon stated, that, from his knowledge derived from other records, he was enabled to state that the place called Aldestow was the same place as Padstow.

Erle proposed to ask Mr. Devon, whether he had not found other records relating to the rights of the priory of Bodmin, besides those produced in this cause?

C. Cresswell.—I submit that the question cannot be put, as it is in effect inquiring into the contents of written documents.

Erle.—It is like the case of asking as to other bills of exchange.

Lord DENMAN, C. J.—I think that the question cannot be put. It is not like an inquiry as to a course of dealing.

The question was not put.

A great deal of evidence was given on the part of the plaintiff; but, at the end of the plaintiff's case,

Erle, for the defendant, applied for a nonsuit, on the ground that there had been no material evidence given in London, so as to satisfy the plaintiff's undertaking.

C. Cresswell.—I have produced a record from the Tower of London.

It appearing that the Tower is not in the city of London the plaintiff was nonsuited (a).

Nonsuit.

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Cresswell, Cockburn, and Butt, for the plaintiff.

Erle, Smirke, and Montagu Smith, for the defendant.

[Attornies—Coode & Browne, and Gore & Lewellin.]

In the ensuing Term, *C. Cresswell*, for the plaintiff, applied for a new trial, on affidavits which stated, that that part of the Tower of London from which the insipimus charter of King Edward the Third was produced, was situated in the city of London.

The Court granted a rule to shew cause.

(a) If a plaintiff has undertaken to give material evidence in a particular county, and does not do so, he will be nonsuited if the objection be taken at the trial; but it was held, in the case of *Hou v. Pickard*, 2 M. & W. 373, that this objection is no ground of nonsuit, unless it be taken at the trial. As to what is material evidence, sufficient to satisfy such an undertaking, see Archbold's Practice of the Q. B. by Chitty, Vol. II. p. 961.

CRAIG, Bart., and Others v. FENN and Others.

Dec. 16.

COVENANT on a policy of insurance effected at the Asylum Life Insurance Office, on the life of the Hon. George Talbot.—Plea, that, at the time of the making of the declaration as to the state of health of the said G. T., and at the time of the making of the policy, the habits of

In an action against an insurance office on a life policy, it is no objection to a special juror being sworn, that he is a director of another in-

insurance office, unless that office has granted a policy on the life in question, and the amount of that policy be unpaid.

If in an action on a life policy the defendants plead that at the time of the declaration of health and the policy the habits of the person whose life was insured were immoderate and intemperate, and that he was addicted to excessive drinking. Replication: that his habits were moderate and temperate, and not immoderate and intemperate, and that he was not addicted to excessive drinking:—*Held*, that on these pleadings the plaintiff should begin, as there was an affirmative on both sides.

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the said G. T. were immoderate and intemperate, and the said G. T. was addicted to excessive drinking, (concluding with a verification).—Replication, that, at the time &c., the habits of the said G. T. were moderate and temperate; and that the habits of the said G. T. were not immoderate and intemperate, nor was he addicted to excessive drinking; (concluding to the country).

Before the jury was sworn, *Kelly*, for the plaintiffs, objected to two of the special jurors being sworn, on the ground that one of them was a director of the Clergy's Mutual Assurance Society, and the other a director of the Albion Insurance Company.

Lord DENMAN, C. J.—Has either of those offices granted a policy on the life of the Hon. George Talbot?

It was admitted on both sides that neither of these offices had.

Lord DENMAN, C. J.—I think that it is no objection, unless there is a policy on the life of the Hon. G. Talbot granted by the office to which the juror belongs, and unless the amount of that insurance is still unpaid.

Both the jurors were sworn.

F. Pollock, A. G., for the defendants.—I submit that the defendants have the right to begin. The question is this, which party would fail if there were no evidence given on either side? And I apprehend that it would be taken that Mr. Talbot was moderate and temperate until the contrary was shewn.

Lord DENMAN, C. J.—There is an affirmative on both sides. I think, on these pleadings, that the plaintiffs should begin (*a*).

(a) See the case of *Soward v. Lins, Knt., v. Desbrough*, 8 C. & P. 321. *Leggatt*, 7 C. & P. 613; and *Raw-*

Kelly, for the plaintiffs, opened the plaintiffs' case.

Verdict for the defendants.

Kelly, *B. Andrews*, and *H. Hill*, for the plaintiffs.

F. Pollock, *A. G.*, *Thesiger*, and *Butt*, for the defendants.

[Attornies—*Wiglesworth & Co.*, and *Swain & Co.*]

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COURT OF EXCHEQUER.

Adjourned Sittings in London after Trinity Term, 1841.

BEFORE LORD ABINGER, C. B.

DAVEY v. MASON.

CASE.—The declaration stated, that the defendant was a common carrier from Newington, in the county of Surrey, to Lindfield, in the county of Sussex, and that the plaintiff, on the 12th of November, 1840, "at a certain house or inn, called or known by the name or sign of the Horse-shoe, at Stones-end, in Newington aforesaid, in the said county of Surrey, caused to be delivered to the defendant, and the defendant then accepted and received from the plaintiff," a trunk, a box, and a small chest, containing divers goods and chattels, to wit, four

Silk dresses made up for wearing are not "silks" within the meaning of the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68, s. 1; nor are an eye-glass with a gold chain attached to it, for the purpose of its being hung round the neck of the wearer, "trinkets"

within the meaning of that enactment.

If a message be left at the booking office of a carrier from N. to L. for his van to call for the plaintiff's luggage at another inn, for the purpose of its being carried to L., and the carrier's servant and van go to the other inn, and the plaintiff's luggage be there put into the carrier's van and afterwards lost therefrom, the carrier is liable for the loss, just as he would be if the luggage of the plaintiff had been taken to the defendant's regular booking-office.

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"that carriers shall not be liable for 'trinkets,' or for 'silks in a manufactured or an unmanufactured state, and

tractor, stage coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say), gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or packages which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid, contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other

servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." And by section 2, "that when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their know-

whether wrought up or not wrought up with other materials" (b), unless the value be declared, and an increased

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ledge." And also by sect. 4, "That, from and after the first day of September now next ensuing, no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid, shall, from and after the said first day of September, be liable, as at the common law, to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding." And by sect. 5, "That for the purposes of this act every office, warehouse, or receiving house, which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage coach proprietors, or common carriers, shall be

liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid." And also, by sect. 6, "That nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, or any other parties, for the conveyance of goods and merchandizes." And also, by sect. 8, "That nothing in this act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct." But, by sect. 9, carriers, although the value of the goods is declared, are not to be liable for more than the value proved at the trial; and by sect. 10, they may pay money into Court.

(b) It may be worthy of consideration, whether the words "wrought up with other materials," do not refer to poplins, chal-

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rate of carriage paid. I submit that the eye-glass and chain are trinkets, and that the silk dresses are silks within the meaning of the enactment.

Lord ABINGER, C. B., (in summing up).—Silk dresses made up for wear clearly do not come within the meaning of the enactment that has been relied on by the learned counsel for the defendant (*c*). Nor can a gold chain used for an eye-glass be considered as a trinket (*d*). The object of the Legislature, no doubt, was to protect carriers from liability, where goods of great value were intrusted to them, and they did not have due notice of the amount of such value. With respect to the other point, it appears that the defendant's servant and van called for these things at the Horse-Shoe, just as it is the custom for carriers to do. If you are satisfied that this luggage was delivered to the defendant's servant, as has been proved, I am of opinion that the defendant is just as much liable in this action as if he had taken up these goods at the Talbot instead of having taken them up at the Horse-Shoe (*e*).

Verdict for the plaintiff—Damages £25.

Humfrey and Corner, for the plaintiff.

Petersdorff, for the defendant.

[Attornies—*G. & C. Corner*, and *Hall & Co.*]

lies, and other goods composed of a mixture of silk and worsted, or silk and cotton, and the like.

(*c*) With respect to the construction of this enactment as to furs, see the case of *Mayhew v. Nelson*, 6 C. & P. 58.

(*d*) Dr. Johnson, in his Dictionary, defines trinkets to be "Toys; ornaments of dress; superfluities of decoration."

(*e*) In the case of *Syms v. Chaplin*, 5 A. & E. 634, and 1 N. & P.

129, the plaintiff sent a parcel, directed to a person in London, to the postmaster of Bradford, to be forwarded to Melksham. The postmaster received 2*d.* to book the parcel, and sent it by a mail cart to the King's Arms, at Melksham. He was accustomed so to take in parcels for the mail cart. The innkeeper, at Melksham, booked the parcel for London, charging 2*d.* as "booking" for his own trouble, and also charging on

the parcel the demand for carriage from Bradford, which he had paid. He forwarded the parcel by a mail coach (of which the defendants were proprietors) to London. Several coaches used to stop at the King's Arms; and this mail pulled up there, but did not change horses. The innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by mail or any other coach. No regular booking-

office was kept at the King's Arms. The parcel was lost:—*Held*, first, that, for the purpose of taking in this parcel, the King's Arms was a receiving-house of the defendants within the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68; and, secondly, that the plaintiff might properly sue the defendants on a contract to carry from Melksham to London. See the case of *Hawkes v. Smith*, post, p. 72.

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Second Sitting at Westminster in Michaelmas Term, 1841.

BEFORE MR. BARON GURNEY.

ATTWATERS v. COURTNEY.

ASSUMPSIT for the board and lodging of the defendant's son, and for teaching him the profession and calling of a chemist and druggist, with a count upon an account stated. Plea—Non assumpsit.

It was opened by *Humfrey* for the plaintiff, that the plaintiff was a chemist and druggist, carrying on business in King's Road, Chelsea; and that, in the year 1835, the son of the defendant had gone to the plaintiff's house and resided there, in the expectation that he was to be apprenticed to the plaintiff; but although he had stayed in the plaintiff's house, and had boarded and lodged there, and had been taught the business of a chemist and druggist, no indenture had been ever executed, and no pay-

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A. placed his son with B., a chemist and druggist, who intended to pass his examination at Apothecaries' Hall, but was delayed in so doing by ill health. It was intended that A.'s son should be apprenticed to B., but he stayed for five years with B., having his board and lodging, and being taught the business of a chemist and druggist, and he then

left B., and was never apprenticed to him:—*Held*, that, to entitle B. to recover for the board, lodging, and teaching of A.'s son, the jury must be satisfied that A.'s son was placed with B. upon an agreement or understanding that B. was to be paid for his board and lodging and for teaching him; but that if the jury were not so satisfied, or if they thought that A.'s son was not to be paid for till B. had passed his examination at Apothecaries' Hall, and that A.'s son was then to be apprenticed to B. as an apothecary:—*Held*, that B. was not entitled to recover any thing for the board and lodging and teaching during the five years.

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ment of any kind made in respect of him by the defendant to the plaintiff.

It was proved, that the son of the defendant had lived at the plaintiff's house and boarded with the family from the month of June, 1835, to the month of February, 1840, when he left; and that, during the time that he was at the plaintiff's house, he was learning the business of a chemist and druggist.

It was proved by Mr. Gregory, a surgeon, that during the first three years the services of a lad in the shop of a chemist and druggist would not be worth his board and lodging in the family; but that after that time his services would be of value, but that much would depend on the young man himself. This witness and Mr. Stephens, also a surgeon, stated, that £150 would be a moderate premium for an apprentice in a business like the plaintiff's, where he was to live with the family. It was also proved by Mr. Alfred King, that, within six months after the defendant's son had gone to the plaintiff's house, the defendant spoke to him on the subject of his son being apprenticed to the plaintiff, and consulted him as to what premium he ought to give. It was further proved by Mr. Alfred King, that the plaintiff had told him that he was not a licentiate of the Apothecaries' Company, and that he had intended passing his examination at Apothecaries' Hall, but had deferred doing so on account of the state of his health; of all which the defendant was aware.

Thesiger, for the defendant.—Does your Lordship think there is any evidence of a contract between these parties?

GURNEY, B.—There is no direct evidence of any contract; but, from the inquiries made by the defendant of Mr. Alfred King, I cannot say that the jury may not infer a contract.

Thesiger addressed the jury for the defendant.—Before

you can find a verdict for the plaintiff, it is necessary that you should be satisfied that this lad was placed with the plaintiff on the terms that the plaintiff should be paid. There is no doubt that it was intended that the son of the defendant should be apprenticed to the plaintiff, and then, beyond all question, a premium would have been paid. If it had been intended that any payment should have been made before the apprenticeship commenced, the plaintiff would not have lain by for five years without some payment having been made, or at least without some claim of payment on his part; however, so far from that, it would appear, by a letter of the plaintiff dated the 27th of February, 1840, that even then the plaintiff considered that he had no legal claim on the defendant. The truth, no doubt, was, that both parties were waiting till the plaintiff had passed his examination at Apothecaries' Hall; and that the intention was, that, as soon as that examination was passed, the lad should be bound apprentice to the plaintiff, not as a chemist and druggist, but as an apothecary, which would give the lad the privilege of passing his own examination when he was otherwise qualified to do so, and that then, and not till then, a proper premium was to be paid. The plaintiff must satisfy you that the lad was in his house on the terms of being paid for. Now, his own letter will shew that the lad was placed there on the terms of not being paid for.

The letter of the plaintiff, dated February, 27th, 1840, addressed to the defendant, was put in. The following is an extract:—

“Your son was with me nearly five years, during which time he became in some measure acquainted with the business, and might have been much more so but for his inattention and neglect. You must be convinced, from the complaints to which I have been obliged to call your attention, that, for some time, he has been quite the reverse of a good and profitable assistant; on the contrary, his frequent neglect, impertinence, and mal-preparation of medicine, has caused me great anxiety of

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mind. I therefore think, that, in duty to myself, I ought to demand a compensation adequate to the time I have lost, and the trouble I have experienced during the time he was with me. Had he been regularly bound, the business would have demanded a handsome premium."

GURNEY, B., (in summing up).—The present claim on the part of the plaintiff is put on the ground, that, when this youth was placed with the plaintiff, the latter was to be paid for his being there; and the question for you to consider is, whether there was an agreement or understanding between the plaintiff and the defendant to that effect? So far as appears to us, the plaintiff never made any claim on the defendant for the board or the lodging, or for the teaching of the defendant's son, till the present action was brought; and in the letter that has been read, the plaintiff suggests that he ought to have a compensation for the trouble and annoyance he has had from the inattention of the lad; but he does not at all claim to be entitled to any thing for board, lodging, or teaching. You will say whether the board, lodging, and teaching, or either of them, were agreed to be paid for. That all depends on the evidence of Mr. King, who says, that, within six months after the son of the defendant went to the plaintiff, the defendant asked him what premium he ought to give. The plaintiff was then, and is now, a chemist and druggist; but he intended to go up to Apothecaries' Hall, and was delayed in so doing by the state of his health; and this appears to have been known to the defendant. Now, if the plaintiff had become a licentiate of the Apothecaries' Company, that would not only have been valuable to himself, but also valuable to this lad, as his apprentice; because, having served an apprenticeship to an apothecary, he would be himself entitled to go up to the examination, and, on passing it, would be entitled to practise as an apothecary himself. If you think that the lad went to the plaintiff on the terms that nothing was to be paid for him till the plaintiff became an apothecary, and that this lad

was then to be apprenticed to him as such, you ought to find your verdict for the defendant.

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Verdict for the defendant (a).

Humfrey and G. Taylor, for the plaintiff.

Thesiger and Corrie, for the defendant.

[Attornies—*Boydell*, and *Hopwood*.]

(a) See the cases of *Wilkins v. Wells*, 2 C. & P. 231, and *Earratt v. Burghart*, 3 C. & P. 381.

Sittings at Westminster after Michaelmas Term, 1841.

BEFORE LORD ABINGER, C. B.

LUCKIE v. GOMPERTZ.

ASSUMPSIT by the plaintiff, as indorsee, against the defendant as the acceptor of a bill of exchange, dated the 7th of August, 1841, drawn by John Osborn, payable to his own order, for £50 two months after date, and by him indorsed to the plaintiff. Second count upon an account stated. Plea to the first count, that the defendant did not accept the bill, (concluding to the country).—Replication, a similitur. There was no plea to the second count, and the award of the venire was in the usual form to try.

C. Clark, for the defendant.—The record is imperfect, as there is no plea to the second count of the declaration; and there is no venire to assess damages, as upon a judgment by default, on the second count. Will your Lordship try the case in the present imperfect state of the record?

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If in assumpsit on a bill of exchange by indorsee against acceptor, with a count upon an account stated, the defendant plead to the first count that he did not accept, and do not plead at all to the second count, and the award of venire be in the usual form to try; the Judge at Nisi Prius will try the issue joined, and, if a verdict pass for the plaintiff, a nolle prosequi should be entered as to the count upon an account stated.

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Lord ABINGER, C. B.—There is an issue properly joined as to the first count?

Humfrey, for the plaintiff.—We can enter a nolle prosequi as to the second count.

Lord ABINGER, C. B.—You can do so.

The jury were sworn; and the acceptance being proved, there was a

Verdict for the plaintiff for the amount of the bill of exchange, and interest.

Humfrey.—The plaintiff must enter a nolle prosequi as to the second count.

Lord ABINGER, C. B.—That cannot be done at Nisi Prius. You shall have execution in a week; but you must make your record right (a).

Humfrey, for the plaintiff.

C. Clark, for the defendant.

[Attornies—*Taylor & Co.*, and *J. Blackford*.]

(a) If a nolle prosequi be entered before issue joined, the plaintiff inserts it at the commencement of his replication, &c., and it consequently appears on the roll when it is

made up; but if after issue joined, it is sufficient if it be entered at the time of entering final judgment.—Archb. Prac. by Chitty, Vol. 2, p. 1083.

1841.

HEMMING v. BROOK.

Nov. 27.

Where, after an action is brought by the indorsee of a bill of exchange against the acceptor, the drawer pays the acceptor part of the amount, the indorsee (unless he be suing as a trustee for the drawer) should take a verdict against the acceptor for the balance and interest only, and when he is paid, he should give the bill up to the drawer.

ASSUMPSIT by the plaintiff, as indorsee, against the defendant as the acceptor of a bill of exchange, dated May 1st, 1841, drawn by Edward Morris on the defendant, payable to the order of the drawer, for £250 three months after date, and by him indorsed to the plaintiff. Plea, that the defendant did not accept.

The acceptance was proved, and the cause was undefended.

Taprell, for the plaintiff, stated, that a sum of £100 had been paid to the plaintiff by the drawer of the bill since the action had been brought.

LORD ABINGER, C. B.—Is your client suing as a trustee for the drawer of the bill?

Taprell.—I am not aware that he is.

LORD ABINGER, C. B.—That being so, your safest course is to take a verdict for the balance and interest only, and give the bill up to the drawer when you are paid.

Verdict for the plaintiff—Damages 153*l.* 5*s.* 4*d.*

Taprell, for the plaintiff.

[Attornies—*Hornby & T.*, and *Wiglesworth.*]

1841.

SMITH v. MARTIN.

Nov. 27.

In an action by the indorsee against the maker of a promissory note, the defendant pleaded that the note was in the hands of G. V., and that, while it was so, the claim of G. V. on this note was by an order of Nisi Prius referred to an arbitrator; and that, before any award was made, the note was in violation of good faith delivered to the plaintiff; and that the plaintiff, at the time he took the note, had full knowledge of all the premises: Replication, that the plaintiff had not any knowledge of the premises:—*Held*, that, on these pleadings the defendant must begin, as the plaintiff's knowledge of the other facts was an essential part of the defence.

ASSUMPSIT by the plaintiff, as the indorsee, against the defendant, as the maker of a promissory note for 128*l.* 2*s.* 6*d.*, dated the 1st of March, 1841, payable six months after date to Messrs. Fisher, Son & Co., and by them indorsed to Messrs. Vincent & Sherwood, and by Messrs. Vincent & Sherwood indorsed to the plaintiff. Plea—that the indorsement by Messrs. Vincent & Sherwood was an indorsement in blank, and that after that indorsement, and before the delivery of the note to the plaintiff, to wit, on the 9th of August, 1841, the note came to and was in the hands of one George Vincent, who then, and at the time of the making of the order of Nisi Prius hereinafter mentioned, was the lawful holder thereof; and that whilst the note was so in the hands of the said George Vincent as aforesaid, by a certain order of Nisi Prius made at the assizes at Croydon, holden on the 9th of August, 5 Vict., before the Right Hon. Sir N. C. Tindal, (stating the caption of the Nisi Prius side of the assizes), “it was ordered, with the consent of the said George Vincent, that, amongst other things, the said promissory note, and all claim of the said George Vincent in respect thereof, should be and the same was then and thereby referred to the award, order, arbitrament, and final determination of one William Bagley, Esq., barrister-at-law, in the said order mentioned, as by the said order, reference being thereunto had, will, amongst other things, fully appear; and the defendant further saith, that the said promissory note was delivered to the plaintiff after the making of the said last-mentioned order of Nisi Prius, before any award made by the said William Bagley, Esq., in respect thereof, and in violation of good faith, and in fraud and contempt of such order; and the defendant further saith, that, at the time the plaintiff took and received the said promissory note, he had full knowledge of all the premises

in this plea mentioned, and this the defendant is ready to verify," &c.

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Replication—"As to the plea of the defendant the plaintiff saith, that he the plaintiff had not, at the time when he took and received the said promissory note as in the said declaration mentioned, any knowledge of the premises in the said plea mentioned, in manner and form as is therein alleged; and this the plaintiff prays may be inquired of by the country," &c.

Crowder, for the defendant.—I submit that on these pleadings the plaintiff ought to begin. The defendant by his plea states facts which are not denied, and the plaintiff answers them by saying he had no notice of them. The defendant states such facts as put the plaintiff upon shewing his title to sue. In the case of *Bingham v. Stanley* (a), which was an action of assumpsit against the drawer of a cheque, the plea was, that the cheque was drawn and delivered to a third person to secure a gaming debt, and by him delivered to the plaintiff without consideration. Replication—That it was delivered to the plaintiff for a good consideration; and there the Court of Queen's Bench held that the illegal drawing of the cheque was so admitted on these pleadings as to throw on the plaintiff the onus of proving the consideration. So, in the present case, the plaintiff by traversing the knowledge only, admits all the other facts stated in the plea. Under the old rules of pleading, if the defendant had given evidence of all the facts admitted on this record, the plaintiff must have given evidence as to how he came by the promissory note.

Macaulay and *Power*, for the plaintiff.—The only question here is, whether the plaintiff had notice of the facts stated or not; and it lies upon the defendant to shew that the plaintiff had notice, and not upon the plaintiff to shew

(a) 1 G. & D. 237.

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that he had no notice. In the case cited, the cheque was given under such circumstances as made it bad, unless the plaintiff was a bonâ fide holder of it for value, and without notice. Here the consideration given for this note is not put in issue upon the pleadings.

Crowder.—A bill given for gaming is good in the hands of a bonâ fide holder for value without notice. The facts admitted here would prevent Vincent from suing, and the title of the holder is, therefore, impeached, and he must shew bona fides and value, and the notice or the want of it is part of the bona fides.

LORD ABINGER, C. B.—I think that the proof of this issue lies on the defendant. The preliminary matter stated in this plea does not make the bill void; and it would not amount to a defence at all unless the plaintiff had notice of it. In the case cited, the cheque was a cheque given for an illegal consideration (a); and unless the plaintiff could set it up by shewing new facts, which would entitle him to recover on it, the facts admitted on the record were an answer to the action. I think that the defendant must prove that the plaintiff had notice of the facts stated in the plea.

Verdict for the plaintiff.

Macaulay and Power, for the plaintiff.

Crowder, for the defendant.

[Attornies—*W. H. Smith*, and *Barron & Co.*]

In the ensuing Term *Crowder* applied for a new trial; but the Court refused a rule.

(a) See the stat. 5 & 6 Will. 4, c. 41.

1841.

Sittings in London after Michaelmas Term, 1841.

BEFORE LORD ABINGER, C. B.

SHEPPARD and Others v. SHOOLBRED and Others.

TROVER for woollen cloths. Pleas—1st, That the plaintiffs were not possessed in manner and form; 2nd, Not guilty; 3rd, That the grievances were committed, &c., by the leave and license of the plaintiffs.—Replication to the 1st and 2nd pleas a similitur; to the 3rd, *de injuriâ* and without the leave and license.

Certain goods were sold by the plaintiffs on the 9th or 10th September, 1840, to one Green, since then a bankrupt. It was submitted to the jury, that Green had bought the goods fraudulently, and that the circumstances under which the defendants purchased them from a man named Ridgeway (who had them from Green) were such as to arouse reasonable suspicion that Ridgeway had not come fairly by the goods in question.

The following facts were proved :—

The plaintiffs were clothiers, residing at Frome, in Somersetshire, and having an establishment in the City. The defendants were drapers, carrying on large wholesale and retail business in Tottenham Court Road.

The goods (which had been purchased by Green from the plaintiffs on a Thursday), were of the value of £816. Green said they were for the New York Market, and gave the plaintiffs references; they were sold for cash *minus* one and a quarter per cent. discount, payable on the following Saturday.

They were sent by Green's order to Ridgeway's counting-house on the Thursday. The credit was afterwards enlarged; and the plaintiffs applying subsequently for payment

the goods originally by fraud, and that the defendants bought them under circumstances which must have convinced them that the goods were so obtained.

Dec. 13.

Though a fraudulent vendee may be sued in trover by the vendor, yet the right of action does not exist against every person into whose hands the property may have passed subsequently.

If G. obtained the goods from the plaintiffs by fraud, and sold them to the defendants, yet, if the defendants were not privy to the fraud, they are not liable to the plaintiffs in trover.

G. bought cotton goods of the plaintiffs to the amount of £816, and they were afterwards sold by R. to the defendants for £589. No transactions were shewn between G. and R.:—*Held*, that the connexion between the plaintiffs and defendants was too remote to raise a cause of action, unless the jury were convinced that G. obtained,

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were not paid, nor did they again see the goods. Some of the property was afterwards transferred to a shop in Tottenham Court Road. The plaintiffs' porter proved the delivery of the goods, according to Green's direction, for Ridgeway, at the warehouse of A., a bill-broker and pawn-broker in London.

The price at which the goods were sold by the plaintiffs was proved to be a fair selling price, and the price at which the defendants bought them, as appeared by their invoice, was sworn to be such that the cloth could not be made at that price.

The examination of Mr. Brown (a partner in the defendants' house), under the fiat against Green, was then put in and read; it was to the effect that Ridgeway called on him on the 26th of November, 1840, and asked him to buy cloth of the sort in question, saying, that it was then at A.'s house, who had discounted a bill for him, and held the goods as security; that Mr. Brown and Ridgeway went to the warehouse of A. and saw the goods, for which he (Mr. Brown) agreed to give him £589, (although they were priced at nearly double that amount by Mr. Ridgeway), on condition that they answered to the representation made of them in quality and quantity. Accordingly they were sold and bought. Some of the cloth was afterwards sold by the defendants to a tailor in Tottenham Court Road, at whose shop it had been recognised. The name of Green was never mentioned in the whole transaction.

For the defendants it was submitted there was no case to go to the jury.

LORD ABINGER, C. B.—Although a fraudulent vendee may be sued in trover, I do not agree that every other person may be made subject to such an action into whose hands the goods may have passed. But I think the case should go to the jury.

Thesiger addressed the jury for the defendants.

Lord ABINGER, C. B., said—The case proposed by the plaintiffs is, that where the goods are fraudulently obtained and sold, no property passes to the vendee, and such is undoubtedly the fact; but *Sir T. Plumer's case* (a) shews, that where the original owner consents to the transfer, that effect does not follow. If the goods in this case were obtained by fraud, yet, if the defendants were not privy to that fraud, I am of opinion that they are not liable in this action. Green's story did not impose upon the plaintiffs; they should have satisfied themselves from the result of his reference, and perhaps they did. But for the rest, the plaintiffs would not care whether the goods went to Mr. A.'s warehouse or to New York, where they were said to be going; *those circumstances* were not the inducement to give credit. Green directed the goods which he bought to be delivered to Ridgeway in Bread

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(a) His Lordship probably alluded to the case of *Taylor and Another, assignees of Walsh, v. Sir Thomas Plumer*, 3 M. & S. 562. In that case a draft for money was intrusted to a broker to buy Exchequer bills for his principal, and the broker received the money and misapplied it, by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the stock and received the proceeds; and it was held, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. In the case of *R. v. B. Walsh*, 4 Taunt. 258, which related to the same transaction, the stockbroker having ad-

vised a proprietor of stock as to the proper time for disposing of it, sold the stock for him and received the proceeds. The principal intrusted him to purchase Exchequer bills to the amount; but it being too late an hour on that day, the broker lodged the money with his own bankers, and gave the bankers of his principal a cheque for the amount. On the following day the principal drew a cheque on his bankers for a larger sum, and gave it to the broker to purchase Exchequer bills. The broker received of them bank bills for the cheque; with a part he bought Exchequer bills for his principal, and delivered them to the bankers of the principal, and with part of the residue he paid for American stock and foreign coin, which he had previously purchased with intention to abscond, and paid away the rest in discharge of debts of his own, and absconded: and it was held, that this was no felony.

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Street, who thus far obtained a property in them by transfer in market overt; there was not any intimation to the defendants from Ridgeway that he had purchased the goods of Green; the only ground of inferring fraud, therefore, is the price paid for the goods by the defendants. If you are satisfied that Green obtained those goods originally by fraud, and that the defendants bought them under circumstances which must have convinced them that the goods were so originally obtained by fraud, then your verdict ought to be for the plaintiffs, if otherwise, for the defendants.

Verdict for the defendants.

F. Pollock, A. G., Kelly, and S. Martin, for the plaintiffs.

Thesiger, Erle, and Boothby, for the defendants.

[Attornies—*Wood & Ellis*, and *W. H. Ashurst*.]

—◆—
RAPSON v. CUBITT.

Dec. 15.

Case for negligence of defendant's servant, and consequent injury to plaintiff. Plea,—That the defendant was not employed to make the alterations, (those through which the injury occurred), in manner and form:—

Held, That, though the defendant had been employed by a society (the Clarence Club), to make alterations and improvements in their club-house, and, though he had employed and stipulated with an agent A. B., a gas-fitter, to do such part of the work as lay in *his* (A. B.'s) department, yet, if A. B. had laid on any pipe not specified in his contract or estimate with the defendant, the defendant was not liable for injury occasioned by the mismanagement or ill manufacture of this particular pipe.

Held, also, that if the pipe in question had been included in A. B.'s contract with the defendant, yet, if, while the defendant's men were working on the premises, and the defendant's contract was not yet finished, and the house was unoccupied, except by the plaintiff, (the servant of the club), the gas had been turned on by *his* direction and not by that of the defendant or his agent, the defendant was not liable.

In such cases as above, although the plaintiff, through the negligence of the defendant, be disabled for life from performing the duties of the office to which he had been accustomed, yet the measure of his damages is by no means to be taken from the amount of an annuity, which would replace the annual salary of the plaintiff. For, non constat that the plaintiff would have retained his situation for life.

The society of a club, through their committee, employed the defendant to make alterations &c., in their club-house, and by the misconduct of the defendant's agent an accident occurred:—*Quære*, Is the society answerable as principal, and is the defendant free as intermediate agent. *Semble*, the defendant, as relating to the immediate cause of the action, is the principal.

tain gas apparatus belonging to the building, and thereupon it became his duty &c.; yet he did not use due diligence; but, on the 21st November, 1840, conducted himself in the alterations upon the gas apparatus with such gross negligence, that by means thereof the gas escaped, and diffused itself over the rooms; and by the said gross negligence the gas became ignited and exploded, and the plaintiff, being in the performance of his said services, was burnt and lacerated by the said explosion, and was disabled to perform his services. That the plaintiff had laid out a large sum of money in procuring medical attendance, and that he had been dismissed from his office through incapacity to perform the duties of it, and also that he is so injured that he is unable to maintain and support himself or his family. Pleas—1st, Not guilty; 2nd, That the defendant was not employed to make *the alterations* in the gas apparatus in manner and form; 3rd, Payment and receipt of 150*l.* in satisfaction. Replication—Denial of the receipt of 150*l.* in full satisfaction.

The defendant undertook, by letter of the 29th August, 1840, to make various alterations in the Clarence Club House, as set forth in certain particulars; the particulars were intitled, "Particulars of work required to be done in alterations, improvements, repairs, and decorations, at the Clarence Club House, per *Wm. Cubitt*." And among other works specified was, "The gas-fittings taken up and generally altered, and made new with fittings." The gas-fitter had a contract with the defendant for the work to be done on his part. The work was done accordingly. While it was in progress, the servants of the club slept elsewhere; but, on Monday, 16th November, 1840, the plaintiff (who was butler to the society) and his wife returned to the club-house, by direction of the secretary to the club. The defendant kept his men at work late at night to bring his contract to a close. The whole of the works were under the superintendence of the defendant's foreman. The gas-fittings having been completed on the basement story, the gas was lighted on the 19th November for the men

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to work by, and was lighted again on the 20th. At one o'clock in the morning of the 21st, the plaintiff and his wife were going to bed, and on their way up they had to ascend to a small passage. It appeared that the gas had escaped into this passage, from a pipe which led to a figure on the stairs, and which had not been stopped, but which, one witness, a gas-fitter, said, ought to have been stopped. The gas had been turned on about half-past 4 o'clock; it had been lighted by the son of the gas-fitter employed by the defendant, and had been put out about 11. The door at the end of the passage into which the gas had been forced was air-tight, and the gas was confined in this particular spot, and hence the explosion which took place, by ignition, from the plaintiff's candle when he came into the passage. Through the accident, the plaintiff and his wife both lost the use of their hands, and were for life rendered incapable of following any business in which manual labour was required. The plaintiff was subsequently discharged from his situation, after receiving a gratuity from the club. Shortly after the accident the defendant sent the plaintiff a cheque for 100*l*.

Part of the sum claimed as damages was the amount of money which would be required to purchase an annuity for the plaintiff, adequate to the sum which he was receiving from the club.

Biggs Andrews, for the defendant, submitted, that the plaintiff must be called; for there was no evidence of any defect in the apparatus; and the defendant, moreover, was the intermediate agent between the society and the party through whose negligence the mischief occurred. He cited *Bush v. Steinman* (a), and *Stone and Another v. Cartwright* (b).

(a) 1 B. & P. 404. In that case, A., having a house by the road side, contracted with B. to repair it for a stipulated sum; B. contracted with C. to do the work; and C. with D. to furnish the materials. The servant of D. brought

a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned; and it was held, that A. was answerable for the damages sustained.

(b) 6 T. R. 411. In that case it was held, that no action lies

Lord ABINGER, C. B.—As to your first objection the evidence is; that the pipe was improperly left unstopped. I think that is a question for the jury. The second point I will reserve for the Court above.

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Biggs Andrews, for the defendant, submitted to the jury, that a technical ground was made the subject of this action, and that damages were sought by the plaintiff for the default, not of the defendant, but of another. The defendant was not conscious of what was going forward as to this particular gas-fitting. He, therefore, was not answerable for defects in the apparatus; but, even if he were answerable for defects in it, and if the jury should consider that any defects had been proved, the defendant was not answerable for the use of the apparatus; and it appeared that another person had the care of the gas, and turned it on.

He called the gas-fitter who had adjusted the pipe in question, and who had a contract with the defendant for what was to be done, and had made an estimate of the work. There was some doubt, however, whether the pipe in the figure, and from which the gas had escaped, were included in the estimate, or were extra work. Another witness, the son of the gas-fitter, who had turned on the gas by the direction of the defendant's foreman, said, that, at nine o'clock on the evening before the accident, he saw the plaintiff, and asked him if he should put out the gas? That plaintiff said he was going out for an hour or two; but that if the witness would give directions to the under butler to turn the gas off he would do so.

Lord ABINGER, C. B. (in summing up).—This is an action to recover damages for personal injury, for costs to which the plaintiff has been subjected, and for the loss of

against a steward, manager, or agent, for damage done by negligence of those employed by him in the service of his principal, but the principal or those actually employed are only liable.

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his situation. The charge is, that the defendant undertook to do certain work, and that he conducted himself with so much negligence about it as to occasion injury to the plaintiff. I own I entertain considerable doubt as to whether this action will lie against the defendant; the objection, however, is upon record: the question, therefore, for you is, whether negligence by the defendant or his servant was the cause of the injury? That there was something wrong was evident; but if any of the servants of the establishment did any thing to the pipe or to the gas before the works were finished, the defendant is not liable. Again.—If you think that the extra work, of which the defendant's witness has spoken, and from defect in which it is said this accident occurred, was done by that witness without the defendant's knowledge, then the defendant is not answerable for the injury thus occasioned. If, however, you think this work was undertaken by the defendant, and that there was negligence, then your verdict must be for the plaintiff. For the damages—I never knew the aggravation of them attempted in so unreasonable a manner as in this case. Where the accident is a calamity, and the defendant is not particularly to blame, a more favourable view should be taken of his fault. If it be asked that the jury are to give damages equal to an annuity, it may be demanded what right has the plaintiff to calculate that he would have continued in office to the end of his life. I think it would be absurd to make the value of the annuity the measure of the damages.

Verdict for the plaintiff—Damages £500.

Platt, C. Saunders, and Sir John Bayley, for plaintiff.

Biggs Andrews and Henderson, for defendant.

[Attornies—*Orlando Webb, and John Evans.*]

1842.

First Sittings in London in Hilary Term, 1842.

BEFORE BARON ROLFE.

POOLE v. PALMER.

DEBT for work and labour, with counts for money paid and on an account stated. Plea, *nunquam indebitatus*.

The plaintiff, by his particulars of demand claimed a compensation for business done by him as an auctioneer and estate agent, relative to an intended sale of an estate in the county of Surrey; and the evidence of the defendant's liability consisted of a written authority to the plaintiff to sell the estate, which was signed by the defendant and others, with respect to which the plaintiff's attorney had given the defendant's attorney the following notice to admit:—

"In the Exchequer of Pleas.

Between *John Ewen Poole*, Plaintiff,

and

Charles Palmer, Defendant.

"Take notice, that the plaintiff in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant, his attorney, or agent, at my office, No. 9, Shore-ditch, on Monday next, between the hours of four and six o'clock in the afternoon; and that the defendant will be required to admit that *such of the said documents as are herein specified to be originals were respectively signed or executed as they purport respectively to have been*; that such as were specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; *saving*

Jan. 19.

A plaintiff, by his notice to admit, called on a defendant to admit an authority to sell an estate "signed by defendant," and dated "10th August, 1840;" and a Judge by consent made the usual order to admit it.

When the document was given in evidence, the date, "August," appeared to be written on an erasure:—

Held, that the defendant, by this admission, had precluded himself from calling on the plaintiff to give evidence to explain the altered date.

Semble, that, by an admission of this kind, the accuracy of the document is conceded.

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all just exceptions to the admissibility of all such documents as evidence in this cause.

"Dated this 4th day of December, 1841.

"Yours, &c.,

"To Messrs. *Dean & Creasy*, "HENRY ASHLEY.
 the Defendant's Attornies. 9, Shoreditch."

<i>Description of Documents.</i>	<i>Date.</i>	<i>Original or Duplicate served, sent, or delivered, when how, and by whom.</i>
Memorandum of authority to sell, directed to plaintiff, and signed by defendant and William Sparshott, Martha Sparshott, Amelia Thornback, Joshua Thornback, Matilda Crowe, and F. W. Palmer.	1840. 10th Aug.	Original.

Upon this notice Baron *Rolfe* made the following order, which was put in:—

"*Poole v. Palmer.*

"Upon hearing the attornies or agents on both sides, I order, that, upon the trial of this cause, the defendant shall, and he does hereby consent to make the admission specified in the notice served by the plaintiff's attorney or agent upon the defendant's attorney or agent, dated the 4th day of December, 1841, so far as respects the documents marked 1 and 7. Dated the 17th day of January, 1842.

"R. M. ROLFE."

The document numbered 1 was the before-mentioned authority, which was signed by the defendant and others. It was put in and read; but in it the date "August" was evidently written on an erasure.

Creasy, for the defendant.—I submit, that this admission, under your Lordship's order, only extends to the admitting the signature to this document to be that of the defendant, and that the defendant is still entitled to insist

on the obvious alteration of the date of the instrument, and to call on the plaintiff to give an explanation of it.

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Evidence was given to shew, that the word "August" was written on the erasure before the defendant signed the paper.

ROLFE, B. (in summing up).—I am of opinion, that in this case the defendant has entirely concluded himself by his admission of this document; and that it is not open to him to raise any objection as to the correctness of the date of it. A party who calls on his adversary thus to admit a document, and which adversary does so admit it, is entitled to consider that the accuracy of the document is conceded to him; and he cannot, at the trial, be called upon suddenly to give evidence respecting it; and it would be unjust that he should do so. This is my decided opinion; but, to save the possibility of further litigation, I will ask the jury, whether they are satisfied, on this evidence, that the defendant signed this paper after the alteration was made in its date, and when it was in its present form.

The jury found a verdict for the plaintiff, adding, that they considered that the date of the authority had been altered before the defendant signed it, and that he had signed it in its present form.

Platt and E. James, for the plaintiff.

Creasy, for the defendant.

[Attornies—*H. Ashley*, and *Dean, Creasy & Dixon*.]

On a subsequent day, *Creasy* applied for a new trial, on the ground that the damages were excessive; but the Court refused a rule.

1842.

Second Sitting in London in Hilary Term, 1842.

BEFORE MR. BARON ROLFE.

HAWKES, the Younger v. SMITH.

Jan. 26.

If a cargo weighing a certain weight be delivered to a carrier to be carried, and when the cargo arrives at its destination, the weight be deficient, this is evidence from which a jury may infer negligence in the carrier; and if the deficiency did not arise from the negligence of the carrier, it is incumbent on him to shew that.

ASSUMPSIT. The declaration stated, that, in consideration that the plaintiff would cause to be delivered to the defendant 69 tons 17 cwt. of bones, to be carried on board a ship from Great Yarmouth to Spalding, the defendant undertook and faithfully promised to carry them safely, and deliver the same within a reasonable time, the act of God, the Queen's enemies, fire, accidents of seas, rivers, and navigation excepted. The declaration went on to state that the defendant, not being prevented by either of the excepted causes, did not safely carry and deliver the bones in a reasonable time, but that, on the contrary, by his negligence, a part of them were lost.

Pleas—1st, Non assumpsit; 2nd, That the plaintiff did not deliver to the defendant the bones in the declaration mentioned to be carried by him; 3rd, That the defendant took proper care of the bones, and did carry them safely and deliver them in a reasonable time; 4th, That the bones were put on board in a damp state, by reason whereof, and without any neglect or default of the defendant, they became decomposed, and the defendant, therefore, could not perform his promise; 5th, That the bones were not the property of the plaintiff; 6th, That the defendant, against his will, was hindered and prevented by the plaintiff from performing his promise; 7th, That the defendant was prevented from performing his promise by the fraud and covin of the plaintiff.

It appeared, that, on the 1st of March, 1841, a quantity of bones, weighing 69 tons 17 cwt., was put on board the

barge John and Eliza at Yarmouth, and from the bill of lading signed by the defendant, which was given in evidence, it appeared that they were consigned by Mr. Coakes to the defendant. The bill of lading contained the exception stated in the declaration as to loss by the act of God, the Queen's enemies, &c. It was proved, that, when the bones arrived at their destination, their weight was only 60 tons 10 cwt. 2 qrs., and the plaintiff's witnesses stated, that in their judgment a cargo of bones like the present would not lose in weight more than about one ton in every twenty.

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Platt, for the defendant.—The breach of contract relied on by the plaintiff is a loss of part of these bones by the negligence of the defendant. This is in effect an action against a carrier for negligence in not performing his duty, and there is no evidence of any negligence in the defendant.

Goulburn, Serjt., for the plaintiff.—The only evidence of negligence that the plaintiff can give is, by his proving that a large quantity of bones was delivered to the defendant to carry, and that at the end of the voyage the quantity was short. A plaintiff could hardly ever give evidence of any particular species of neglect of a carrier, unless he sent his servant with the goods all the way that they went.

E. James, on the same side, referred to the case of *Muddle v. Stride* (a).

ROLFE, B.—It has been proved, that more than 69 tons of bones were put on board this vessel, and that at the end of the voyage there were not 69 tons, but a much smaller weight. I think that this is evidence from which the jury may infer negligence; and that if there was no

(a) 9 C. & P. 380.

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negligence on the part of the defendant he should shew that (b).

Platt, for the defendant, addressed the jury, and called witnesses to prove that the bones fermented very much during the voyage; and other witnesses, who proved, that they had known of cargoes of bones which had lost weight on a voyage to a greater extent than the bones in question.

Verdict for the defendant on the third and fourth issues, and for the plaintiff on the other issues.

Goulburn, Serjt., and *E. James*, for the plaintiff.

Platt, and *Bovill*, for the defendant.

[Attornies—*Willis & Co.*, and *Jordeson*.]

(b) In the case of *Gilbart and Another v. Dale*, 1 Nev. & P. 22, it was held, that in an action on the case against a booking-office keeper for the loss of a parcel by negligence, it is not sufficient evidence of negligence to shew, that the parcel was delivered to the defendant, and that it had not reached its destination; and Mr. Justice *Patteson* said, "Let us look at what the contract with the defendant is. The defendant is not a carrier, he is the keeper of a booking-office, and his contract with the plaintiffs is to take care of those goods left with him, that they

may be forwarded to their destination, either by coach or by some carrier; in other words, his contract is to deliver them to some carrier, in order that they may be forwarded. Now the contract of a carrier is to deliver to the consignee, and *Griffiths v. Lee*, (1 C. & P. 110,) is very good authority to shew that the non-delivery to the consignee is sufficient evidence of negligence against the carrier, for his contract is to deliver the goods." See the case of *Griffiths v. Lee*, 1 C. & P. 110, and the authorities there referred to.

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COURT OF COMMON PLEAS.

Sittings in London after Michaelmas Term, 1841.

BEFORE LORD CHIEF JUSTICE TINDAL.

ISRAEL ALEXANDER and HENRIETTA ALEXANDER v.
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DECLARATION—That the defendant, on the 10th of March, 1840, made his draft on Young & Son, bankers, and thereby required them to pay the plaintiffs 48*l.* 16*s.* 6*d.*, and then delivered &c.; and that Young & Son did not pay the said draft, though the same was then presented to them for payment. **Pleas**—That the defendant made his draft aforesaid, directed as aforesaid, and that the plaintiffs took it in payment, &c.; and that the draft was *not* duly presented for payment, nor within a reasonable and proper time in that behalf. **Replication**—That the plaintiffs ought not to be barred &c., because they say that the said draft was duly presented, (concluding to the country).

The plaintiffs sold horses to the defendant on the 10th of March, 1840, and in payment the defendant gave a cheque on his bankers, which the plaintiffs crossed to their own bankers and paid in to them on the 11th of the same month. The defendant's bankers did not use the clearing-house in Lombard-street, and accordingly the plaintiffs' bankers presented the cheque to the defendant's bankers on the 12th, whereas, otherwise, they would have presented it at the clearing-house on the evening of the 11th. The defendant's bankers had stopped payment on the

This was an action on a bankers' cheque, and the question was, whether the cheque was presented in due time. The plaintiffs were auctioneers, keeping a repository for the sale of horses, &c. On the 10th of March, 1840, they had a sale, which the defendant attended, and he there bought two horses. The cheque, on which this action was brought, was given for the price of those horses. The last horse purchased by the defendant on that day was purchased after four o'clock on the after-

12th:—*Held*, that the bankers of the plaintiffs had acted in strict accordance with the rules of mercantile law; but that the plaintiffs themselves had been guilty of laches in not paying the cheque to their bankers on the 10th, if they received it within banking hours.

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noon of the 10th of March, 1840, and the defendant applied then to have the horses delivered to him, and gave the cheque in question in payment. One of the plaintiffs, who was the auctioneer on the occasion, said, "It is rather late in the day for a cheque;" to which the defendant answered, "Cross it with your bankers' name, and pay it in tomorrow, and it will be all right." The auctioneer accordingly did write his bankers' name (Whitmore & Co.) across the cheque, and the horses were delivered to the defendant. On the next day, (the 11th of March, 1840), the plaintiffs paid the cheque into their bankers' house. The cheque was drawn upon a house of the name of Young & Son, bankers, in Smithfield. It was not the practice of Young & Son, that their clerk should meet the clerks of other bankers, at the clearing-house, in Lombard Street. It was proved, that cheques are presented, according to the course of business, at the clearing-house, for those who use the clearing-house, the same evening, and other cheques are sent out the day after they are received. Whitmore & Co. presented the cheque for payment to Young & Son on the 12th. The answer was "No order;" and Young & Son did not pay any thing after half-past nine on the morning of that day.

The witnesses, for the defendant, spoke to the hour of the sale being earlier than that mentioned, and also contradicted the evidence as to the special contract respecting crossing the cheque with the name of the plaintiffs' bankers.

Sir *T. Wilde*, for the plaintiffs, submitted, that they must have a verdict. The law was, that a man was entitled to pay his cheques into his bankers' hands, instead of putting himself to the inconvenience of presenting them in person; and he may present them at any time on the day after he receives them.

TINDAL, C. J.—I agree with you, that it is sufficient if they be presented at *any time* on the next day.

Sir *T. Wilde*.—Then the effect of the plaintiffs' paying it in to their own bankers, instead of presenting it to the bankers of the defendant, is to prolong the presentment of it for another day; for the banker always has one day to present. There was, therefore, no unnecessary delay on the part of the plaintiffs.

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TINDAL, C. J., in summing up.—This is an action brought upon a cheque dated 10th of March, 1840; and the question raised for your consideration is, whether this cheque was presented to the parties, on whom it was drawn, in due and reasonable time? It was received by the plaintiffs on the 10th, and paid in to their bankers on the 11th, and by them presented in time, as far as their customer was concerned, viz. on Friday the 12th. Young & Co., on whom the cheque was drawn, were not persons who used the clearing-house. The question is, whether the cheque was presented in time, not being presented till Friday the 12th? The counsel for the plaintiffs has rested his case on two grounds: 1st, on the general law of merchants; and, 2ndly, on a particular agreement between the parties. If the particular agreement is made out to your satisfaction, it will dispense with the general law, whatever that law may be. The only way in which I can state the rule of law to you is this, that, if a party receive a cheque on a particular day, he may present it at any time during banking hours on the following day to that on which he received it. I am not aware of any decision which says, that a person may keep it all the first day, and on the second pay it in to his own bankers', and that they may present it on the third day. The cases which seem to bear upon this point relate only to the notice of dishonour, and not to the time of presentment. I cannot agree, that, if a bill becomes due, say on the 1st of March, the holder may pay it in to his banker's on the 2nd of March, and that his banker will have till the following day, the third, to present it. It is good law as to notice, but I do not think that it is

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Manning, Serjt.—I put it in to shew, as will appear by it, that whatever title the plaintiff might have in February, 1840, yet that in the summer of the same year that title had ceased to exist; for the document is, as its indorsement in the plaintiff's handwriting purports it to be, the draft of a lease of the premises in question from Mr. Agar to Mr. Young, rent 8*l.* a-year, term twenty-one years, from some day in 1840, but the date is not specified.

ERSKINE, J., in summing up the evidence, told the jury, that, in the first place, the defendant having entered into the agreement mentioned with the plaintiff, there was a conclusive case made out for the latter, unless there were a sufficient answer to it. Two defences had been advanced for the jury's consideration:—First, that the defendant was in occupation of the premises before the agreement entered into between himself and the plaintiff came into operation; that the ground belonged to Dr. Robins, and that, therefore, although he did incautiously sign this agreement, yet, as he already had the land, the plaintiff could not do the authoritative act of putting him in possession of it, nor could he (the defendant) submit to the acknowledging act of receiving possession from him (the plaintiff); and then (assuming Dr. Robins' title) that, as the ground did not belong to the plaintiff, he could not confirm the defendant in the possession of it. Had this been made out, it would have been an answer to the action. But the principle of law is, that a tenant having taken of his landlord shall not deny his landlord's title, because, if he has taken land from a person who had no right to give it, his first duty is to surrender it back, not to deny the title of the donor or lessor. On this point two facts have appeared in evidence:—First, that the defendant, after the agreement made, and before it came into operation, removed the fence, and did other acts of ownership; but, secondly, that Dr. Robins, the landlord set up by the defendant, expressly told him, that he would

not let that spot to him, as he wanted to make arrangements with Mr. Agar respecting it. It appeared, therefore, that the defendant took possession under Mr. Agar, and he has no right to say, that at *that* time Mr. Agar had no title. But they say, secondly, that *since* that time his title has ceased. This is an allowable defence in an action for use and occupation; for if the title to the property has passed to another who has a right to sue the defendant for its use and occupation, he has a right to set up that defence; but the title set up is by a paper indorsed by the plaintiff, purporting to be a lease from Mrs. Agar to the defendant, without a date. If there had been any thing to show any transaction between Mrs. Agar and the plaintiff, as for instance, that, since the agreement with the defendant, the plaintiff had passed his title to her, that transaction no doubt would have been material evidence; but it is to be remembered, that it was proved that the plaintiff had said at the time of the agreement, that the property belonged to his mother, Mrs. Agar. Now the document is not evidence admissible for that purpose, for then the defendant would be doing the same thing in effect as setting up Dr. Robins' title against that of the plaintiff.

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Verdict for the plaintiff—Damages, 8*l*.

Shee, Serjt., and *E. James*, for plaintiff.

Manning, Serjt., for defendant.

[Attornies—*Collins*, and *Evans*.]

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First Sittings in Middlesex after Michaelmas Term, 1841.

BEFORE LORD CHIEF JUSTICE TINDAL.

Nov. 26.

TUCKER and Others v. INMAN and Another.

The jurisdiction, to determine whether a married woman has power to make an appointment in the nature of a will, belongs to the Queen's Temporal Courts.

It is necessary that administration, in some degree, should be granted, before the Court of Chancery will adjudicate on the validity of

a testamentary appointment made by a married woman.

And if a married woman have a power of appointment over a particular amount of property, and that property is purchased by A. B., the Court of Chancery will adjudicate respecting it, whether the Prerogative Court grant letters *limited* to that amount only, or give *general* letters of administration.

In the case where a married woman has a power of appointment over a certain amount of property bequeathed, the Prerogative Court will not grant to A. B., (he not being the husband of the deceased nor executor), administration *cæterorum*, but *only limited* to the amount in question.

Where, in prohibition, there is a special traverse of the allegation of the practice of the Court of Chancery, respecting the will "so made by Sarah Inman," namely, that it was not necessary, before that Court would proceed to adjudicate, that *limited* letters of administration should be granted, the traverse is made out by shewing that in *this case* the Prerogative Court will not grant more than *limited* letters to the party in question, although it be shown that the Court of Chancery would adjudicate if the letters of administration had been *general*.

(a) *In the matter of Sarah Inman*, 1 Scott's New R. 379. The rule nisi was granted on the following affidavit:—

Previously to the marriage of one George Inman, clerk, since deceased, to one *Joan Darch*, spinster, to wit, on the 19th day of January, A. D. 1760, certain hereditaments, situate at B., in the county of Somers-

set, were conveyed to trustees, to the use of the said *George Inman in fee*, until, &c., and then to the use of the said *George Inman*, for his life, with remainder to the use of *Joan* his intended wife, for her life, with remainder to the use of trustees to preserve contingent remainders, and after the death of the survivor of them, the said *George*

rule, *Tindal*, C. J., said—"I think the parties, who deny the power of Sarah Inman (a married woman) to make

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Inman and Joan his intended wife, to the use of such child or children of the said marriage, in such shares and proportions, and for such estate or estates as the said George Inman should, by any deed or writing under his hand and seal, executed, &c., or by his last will and testament, limit, appoint, or devise, and in default thereof, to the use of the first son of the said George Inman and Joan, and the heirs of the body of such first son. That the said marriage was duly solemnized. That there was issue of the said marriage, one other George Inman, one Henry Inman, and one Sarah Inman, who intermarried with and took to husband one John Inman. That afterwards, to wit, on the 1st day of January, A. D. 1795, by an indenture under the hand and seal of the said George Inman, made between the said George Inman, clerk, of the first part, and the said John Inman and one John Whitley, of the other part, which indenture was executed by the said George Inman, clerk, in the presence of two witnesses, the said George Inman, in exercise of the power so given or reserved to him by his marriage settlement, appointed the said hereditaments to the said John Inman and John Whitley, their heirs and assigns, for ever, upon trust to receive, &c., and apply the same, or so much thereof as should be necessary, in the maintenance of the said George Inman, the son, for his life, and after his decease, then, as to one moiety of the said hereditaments, to the use of such person or persons,

and for such estate and estates, as the said Henry Inman should, in manner therein mentioned, appoint, and in default thereof, to the use of the said Henry Inman, his heirs and assigns; and as to the remaining moiety of the said hereditaments, *To the use of such person or persons, and for such estate and estates as the said Sarah Inman, so then being the wife of the said John Inman therein mentioned, should appoint*, and in default thereof, to the use of the said George Inman, his heirs and assigns, for ever; and in which indenture was contained a power for the said last-mentioned trustees, in case the rents and profits of the said hereditaments should be more than sufficient, with certain other provisions therein mentioned, for the support and maintenance of the said George Inman (the son), to pay over the surplusage thereof, from time to time, unto the said Henry Inman and Sarah Inman, their executors, administrators, and assigns, in equal shares; and wherein was also contained a declaration, that in case the said last-mentioned trustees, during their joint lives, should think it was beneficial to sell the said hereditaments, it should be lawful for them to do so, and place out the net produce on government or other good security, and to apply the interest money arising therefrom towards the maintenance of the said George Inman (the son), for his life, in the same manner, &c.

That neither the share of the said Henry Inman, nor that of the said Sarah Inman, in the monies

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a will, should declare in prohibition. Those who insist upon the right to administration with the will annexed,

which might arise by any such sale as aforesaid, was, by the said indenture, subjected to any power of appointment whatsoever.

That afterwards, the said George Inman, clerk, died. That afterwards, to wit, on the 5th and 6th days of November, A. D. 1795, by certain indentures of lease and release, the said George Inman (the son), of the first part, the said Henry Inman and Katharine his wife, the said John Inman and Sarah his wife, and John Whitley, of the second part, Robert Blake, of the third part, and Peter Cox, of the fourth part; and by a common recovery, afterwards duly suffered in pursuance thereof, the said hereditaments were conveyed, limited, &c., to the use of the said John Inman and John Whitley, their heirs and assigns, Upon trust to sell the same and invest the produce in some of the public stocks, &c.; and to apply the dividends towards the maintenance of the said George Inman (the son), for his life, and to apply the rents and profits in the meantime, until the sale, in like manner; and, after the decease of the said George Inman (the son), then to stand possessed of the said interest monies, and the future interest or dividends thereof, Upon trust for the said Henry Inman and Sarah Inman, in equal shares, or in trust for their respective executors, administrators, or assigns, in case they or either of them should die in the lifetime of the said George Inman (the son), and to pay and transfer the same accordingly. That afterwards the said hereditaments were sold. That, on the 24th day of February, A. D.

1802, a certain indenture, expressed to be made between the said George Inman (the son), of the one part, and the said John Inman and John Whitley, of the other part, was executed by the said George Inman (the son), and which indenture never was executed by the said John Inman and John Whitley, or either of them, and to which indenture, neither the said Henry Inman nor the said Sarah Inman was made or was named as parties; by which indenture, after reciting the said hereinbefore recited indenture of the 1st day of January, 1795, so far as relates to the appointment of the hereditaments aforesaid, and the uses thereby declared thereof, but wholly omitting the particular trusts thereby declared with respect to the application of the monies arising from any sale of the said hereditaments; and after reciting that the said hereditaments had been sold, and that the said George Inman (the son) was desirous and willing that the monies arising from the sale aforesaid, amounting to the sum of £1050, should be vested in the said John Inman and John Whitley, for the uses therein-after mentioned, agreeably to the intention of the said George Inman: It was witnessed, that, for the purpose of carrying such intention into effect, and in consideration of one shilling to the said George Inman (the son) therein stated to be paid by the said John Inman and John Whitley, George Inman (the son) did direct and declare, that the said sum of £1050 should from thenceforth be vested in the said John Inman and John

will then have an opportunity of shewing that Sarah Inman had authority to make this will." And again,

Whitley, their executors, administrators, and assigns, upon trust to apply the interest, dividends, or produce of the same sum of £1050, or so much thereof as should be necessary, in the maintenance of the said George Inman (the son), during his life, and after the decease of the said George Inman (the son), Upon trust, as to one moiety of such principal sum of £1050, to the use of such person or persons as the said Henry Inman should, in manner therein mentioned, appoint, and in default thereof, to the use of the said Henry Inman, his executors, administrators, and assigns, and, as to the remaining moiety or half part of the hereditaments and premises thereby limited and appointed, to the effect following, that is to say, To the use of such person or persons, for such estate and estates, either absolutely or conditionally, and with or without power of appointment, and in such sort, manner, and form, and subject to such powers, provisos, conditions, and agreements, as the said Sarah Inman, by herself alone, and whether sole or covert, should, from time to time, by any deed or deeds, writing or writings, to be by her signed, sealed, and delivered in the presence of two or more credible witnesses, or by her last will and testament, (which last will and testament, it was thereby expressed, that the said Sarah Inman should have power to make, as to her should seem meet), to be by her signed and published in the presence of three or more credible witnesses, direct, limit, and appoint, and in default thereof, to the use of the

said George Inman; and by the said last-mentioned indenture, it was provided, in case the interest and dividends of the said £1050 should be more than sufficient, with a certain other provision in that indenture mentioned, for the support and maintenance of the said George Inman (the son), it should be lawful for the said John Inman and John Whitley, and the survivor of them, his executors, and administrators, to pay over such surplussage, from time to time, or any interest or dividends then in their hands, unto the said Henry Inman and Sarah Inman, their executors, administrators, and assigns, in equal shares and proportions.

That afterwards, to wit, on the 3rd of September, A. D. 1807, the said Sarah Inman died, leaving the said John Inman her surviving, having, previously to her death, executed an instrument purporting to be a testamentary appointment, dated the 3rd day of September, 1807, and purporting to be made in pursuance of the power so expressed to be given to her in and by the said indenture of the 24th day of February, A. D. 1802; in which instrument, it was expressed, that the said Sarah Inman had appointed the interest, produce, or dividends arising from all such money or principal sum of money, over which she had a disposing power, unto the said John Inman, for his life, with the remainder to her nephew, John Inman of Murehead, and in which instrument it was also expressed, that the said Sarah Inman appointed her said *husband executor of her said will*. That, on the

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in giving judgment, his Lordship said—"I have always understood that the Ecclesiastical Courts have no jurisdiction to decide whether a married woman has power to make a will. *Brook v. Turner* (b) and *Jenkin v. Whitehouse* (c) are authorities in favour of that proposition; and no case has been cited in which the contrary was determined. With respect to the sufficiency of the power in this case, there appears to be so much doubt, that we ought not to be called upon to decide immediately. The parties who pray for the writ must therefore declare in prohibition; and, when the case comes before us again, we shall be better enabled to determine whether the writ ought to go. In the mean time the rule will be enlarged." Upon this, the plaintiff declared in prohibition. The declaration set

27th day of January, A. D. 1813, the said John Inman died, leaving the said John Whitley him surviving, having previously duly made and published his last will and testament in writing, bearing date the 11th day of April, 1812, and thereby appointed James Tucker, and the said John Whitley, both since deceased, executors of his said will, and who duly proved the same in the Prerogative Court of Canterbury. That the said John Whitley departed this life on the 6th day of December, A. D. 1831, leaving the said James Tucker him surviving. That afterwards, to wit, on the 5th day of April, A. D. 1834, the said James Tucker died, having first duly made and published his last will and testament in writing, and also a codicil thereto, and thereby appointed the said John Inman Tucker, William Tucker, and John James, the plaintiffs, executors thereof, and who, afterwards, to wit, on the 3rd day of June, A. D. 1834, duly proved the same in the Consistorial Episcopal Court of Wells. That after-

wards, to wit, on the 1st day of August, A. D. 1838, the said George Inman (the son) died; and that afterwards, to wit, on the day and year last aforesaid, the said William Tucker, as one of the personal representatives of the said John Inman, deceased, as aforesaid, applied for and obtained a commission out of the said Prerogative Court of the Archbishop of Canterbury, for the purpose of being duly sworn to administer the goods and chattels of the said Sarah Inman, deceased, in order to obtain letters of administration to be granted to him of the goods and chattels of the said Sarah Inman, deceased, for the purpose of administering the same to and amongst the residuary legatees, under the said last will and testament of the said John Inman, deceased; and that before the commission was obtained, to wit, on the 28th December, 1839, the defendant caused the citation in question to issue.

(b) 2 Mod. 170.

(c) 1 Burr. 431.

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out the facts as given in the above note, and the citation of the plaintiffs to shew cause why letters of administration with the will of Sarah Inman annexed, should not be granted to the defendants, they alleging, that, in April, 1819, they had purchased from John Inman (the nephew of the said Sarah Inman) his reversionary interest in a certain trust fund bequeathed to him by the intended will of the said Sarah, and claiming to be entitled to such letters of administration with the said will or testamentary writing annexed: "whereupon, inasmuch as by the laws of this realm a feme covert cannot make any will or testament, or do any act or make any appointment by an instrument in the nature of a last will and testament, without having authority from her husband for that purpose, and inasmuch as the determining whether a feme covert has such authority is not matter of ecclesiastical cognizance, but belongs to the cognizance of her Majesty's Courts of Common Law, the plaintiffs pray that her Majesty's writ of prohibition may issue directed to the proper Judge of the Prerogative Court, to prohibit that Court from proceeding to require the plaintiffs," &c. And of this the plaintiffs bring suit, &c.—Plea, That the writ ought not to issue; because Sarah Inman, on the 3rd of September, 1807, made the will mentioned, in the presence &c., and the same being in the custody of the plaintiffs, the defendants cannot bring it into Court. And the said Sarah thereby, &c.,—[setting out the appointment of the money over which she had a disposing power, first, to J. I., her husband, and then to J. I., her nephew; appointing her husband to be executor of her will; the death of Sarah I. and of J. I. her husband, leaving J. I. her nephew surviving.] It then recited the indenture of 1819, by which J. I. assigned to the defendants the moiety of the sum of money (£1050), which had been appointed to him by Sarah I. That, in 1838, the appointee, J. I., died, whereupon the defendants had valid grounds for exhibiting their bill of complaint in Chancery, in which they would have stated, that, by the rules of equity, J. I. the husband

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of Sarah, must be taken, by reason of his conduct in the premises, to have assented that Sarah I. should, during her coverture, make the appointment mentioned. That the plaintiffs, claiming to be the personal representatives of J. I., the husband of Sarah I., and having obtained possession of the will of Sarah I., refused to admit the equitable right of the defendants; and that it thereupon became necessary for the defendants to institute a suit in the Court of Chancery.

That, according to the course and practice of the Court of Chancery, and the rules of equity in that behalf, in order to obtain the adjudication of the said Court in due form upon the validity in equity of the said appointment *so made by the said Sarah I.*, to pass the equitable right and interest of and in one moiety of the said sum, according to the tenor and effect of the said last-mentioned appointment, it was and is necessary that letters of administration with the said will annexed, should be granted to some person or persons, limited so far only as concerns all the right, title, and interest of her the said Sarah I., in and to the said moiety of £1050, and all interest due and to grow due thereon, which she, the said Sarah, had a right to dispose of, but no further or otherwise, to the end that such administrator or administrators with the said last will and testament annexed, but limited as aforesaid, might be made a party or parties to the said suit in Chancery. That because the plaintiffs refused to propound the said will in the Ecclesiastical Court, and to take out, or suffer others to take out, letters of administration with the said will annexed, and limited as aforesaid, and thereby fraudulently intended to prevent the defendant from obtaining an adjudication in the Court of Chancery, upon the validity in equity of the said appointment, the defendants, on the day and year, &c., caused a citation to issue, &c., requiring the plaintiffs, as aforesaid, and to shew cause why letters of administration with the will annexed of the said Sarah, but limited as before is mentioned, should not be granted to the defendants, as they lawfully might, &c. Which is

the citation in the declaration mentioned.—Verification. Wherefore they pray judgment, and that the writ of prohibition may not issue.

Replication—That according to the course and practice of the High Court of Chancery, and the rules of equity in that behalf, in order to obtain the adjudication of the said Court upon the validity in equity of the appointment alleged to have been made by the said Sarah I., to pass the alleged equitable right and interest of and in the said moiety, &c., according to the tenor and effect of the said supposed appointment, it was not nor is necessary, that letters of administration with the said supposed will annexed, should be granted to some person, limited so far only as concerns all the right, title, and interest of the said Sarah in and to the said moiety, from which the said Sarah had a right to dispose of, and had by this alleged will disposed of accordingly, but no further or otherwise, to the end that such administrator or administrators with the said alleged last will annexed, but limited as aforesaid, might be made a party or parties to this suit in Chancery, provided that there was a sufficient legal personal representative of the said Sarah before the said Court of Chancery. That before the issuing of the said citation, W. Tucker, as one of the personal representatives of J. I., the husband, had obtained a commission out of the Prerogative Court for the purpose of being duly sworn as administrator of the goods and chattels of the said Sarah I., in order to obtain letters of administration to be granted to him of the said goods, &c., for the purpose of administering the same among the residuary legatees of the said last will and testament of J. I.: That W. Tucker is ready and willing to administer, &c., and thereby to become the legal personal representative of the said Sarah: *without this*, that, according to the course and practice of the said Court of Chancery, and the rules of equity, in order to obtain adjudication of the said Court upon the validity in equity of the said appointment *so made by the said Sarah I.*,

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to pass the equitable right, &c., in one moiety, &c., according to the tenor and effect, &c., it was or is *necessary* that letters of administration with the will annexed should be granted, *limited so far only* as concerns all the right, title, &c. of the said Sarah I., in and to the said moiety, &c., but no further or otherwise, to the end that such administrators &c., might be made a party to the said suit in Chancery, in manner and form, &c. Conclusion to the country.

Knowles, for the defendant, began.—He submitted that the jury were called to decide on what was the practice of the Court of Chancery. The plaintiffs were the executors of James Tucker, the surviving executor of John Inman, the husband of Sarah Inman. The question is, whether the plaintiffs, in their representative capacity, are entitled to property which John was said to have taken in right of his wife Sarah, or whether the defendants should take under the will of Sarah I. The question in fact is, whether Sarah Inman had a right to make a will.

TINDAL, C. J., to *Manning*, Serjt.—Why did it not come on as a motion in Chancery, whether, before they can adjudicate on the question of a married woman's right to make a will, the defendant should not take out *limited* letters of administration? The question is as to the practice of the Court of Chancery. If the Ecclesiastical Court have no power to grant probate or letters of administration to the will of a married woman, how can the course of Chancery practice give them that power?

Manning, Serjt.—They chose to state the practice of the Court of Chancery.

TINDAL, C. J.—And you deny that practice; if you succeed in disproving the practice you will not be satisfied. Still, as that is the issue, we must go on to try it.

Knowles (to the jury).—The question is, not of the practice of the Court of Chancery generally, but only in certain cases? I will show that the will must be propounded in the Prerogative Court, and letters of limited administration having been then granted, the Court of Chancery will proceed to adjudicate on the validity of the appointment made by the married woman.

It was proved by Mr. Ellison and Mr. Chapman of the Chancery bar, that, according to the practice of that Court, in order to obtain an adjudication on the validity of a testamentary appointment by a married woman, it was necessary that the testamentary character of the appointment should be established in the Ecclesiastical Court; and that nothing more was requisite for that purpose than letters of administration (*cum testamento annexo*), limited to the amount in dispute; but, in cross examination, those gentlemen said there would be no objection to *general and unlimited* letters of administration, provided the Prerogative Court would grant them. The Court of Chancery would be satisfied with such an administration as the Prerogative Court would give.

TINDAL, C. J. (to *Knowles*).—If that be the case, how can your issue be supported?

Knowles.—We shall shew that the Prerogative Court will not give more than limited letters of administration.

It was then proved by Dr. Curteis, that if a married woman make a will under a power of appointment, which gives her power to appoint to a limited amount, the Prerogative Court would grant administration *cum. test. ann.* limited to the amount over which the power extended; and if the interest in the fund over which the married woman had power were purchased by another party, that party would be entitled to call upon the Prerogative Court for such limited administration; and if there were a will, the

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husband of the deceased could not take out administration generally; he might have administration *ceterorum*. If the beneficial interest over which the wife had power were counter to that of the husband, the Court would not grant him the two administrations, unless he were executor, *nor in the particular case in question*.

TINDAL, C. J.—Is that the issue? Is not the issue as to the general practice of the Court of Chancery?

Knowles.—The issue is as to the will “*so made by Sarah*.”

Dr. Curteis also stated, that in this case, if the personal representatives of the husband, he dying, not having proved, refuse to admit the equitable right of the other party, administration with the will annexed, but limited to the amount in question, would be granted to the person beneficially interested.

Knowles.—And those are the very words of our plea.

Manning, Serjt., I submit that the issue in this case is on the general question, whether it is *necessary* that a limited administration be granted. It is in evidence that the Court of Chancery will proceed with any administration which the Prerogative Court may give them. The evidence of Dr. Curteis, therefore, is irrelevant; for the issue here is not as to the practice of the Ecclesiastical Court, but of the Court of Chancery. The allegation is, that, by the practice of the latter Court, limited administration is required. The evidence is, that limited administration is not requisite, but that no more than limited administration is ever given, under the circumstances.

TINDAL, C. J.—I think this is not a general issue touching the practice of the Court of Chancery, but an issue to try what is the practice of that Court in the case of a suitor

seeking to obtain its adjudication respecting the validity of the appointment by Sarah Inman *in this particular case*. The two gentlemen from the Court of Chancery give evidence respecting the practice in this particular case, and more. But, then, Dr. Curteis, in speaking of the practice of the Ecclesiastical Court, says, that, under the circumstances here, nothing more than limited administration would be granted.

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Verdict for defendants, with liberty to plaintiffs
to move to set it aside, if the construction
of the Court on this plea be erroneous.

Manning, Serjt., and *W. M. James*, for plaintiff.

Knowles, and *Hugh Hill*, for defendant.

[Attornies—*Holme & Co.*, and *Barnwell*.]

Sittings at Westminster, after Michaelmas Term, 1841.

BEFORE LORD CHIEF JUSTICE TINDAL.

PETRIE v. LAMONT, STEWART, MATRAVERS and JONES.

THE declaration (in trespass), stated, that the defendants broke and entered a dwelling-house of the plaintiff,

A lease from the
Board of Ordnance, which
purported to be
signed, sealed,

and delivered, being first duly stamped, was not stamped; and the Court held, that, being a lease from the Crown, it was not necessary that it should be.

The defendants were partners in business as brewers; and one of them, in the name of the others, wrongfully ejected the tenant of a canteen, who held under a lease from the Board of Ordnance, they (the defendants) being sureties for the payment of his rent and for his quiet tenantship. It was ruled that one partner has no right to involve another, unless in the ordinary course of their business, not, for instance, in a trespass, as above stated.

The exception to this doctrine is in the case where the trespass is in the nature of a taking which is available to the partnership; and in such case the jury should find, not only whether the defendants were partners, but also whether, before the trespass, they all joined in ordering it, or whether, afterwards, they concurred, and received the benefit of it.

Where one of the trespassers is servant to the others, it is a question for the jury, whether he acted merely as servant, or whether he were so implicated in the matter as to make himself a principal trespasser.

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called the Canteen, situate in Hounslow Barracks, and ejected the plaintiff and his family, and continued them so ejected, &c.; that they, the defendants, seized and took certain goods, &c., [naming household furniture, and the furniture peculiar to an inn, also many gallons of beer, porter and ale, brandy, and other stock.] Plea—Not guilty.

The three defendants, Lamont, Stewart, and Matravers, were said to be in partnership as brewers: Jones, at the time of the trespass, was their collecting clerk. The plaintiff had also been a servant to them, and, at the time of the trespass, kept the Canteen public-house at Hounslow Barracks, where they supplied him with beer and other stock, for which, in January, 1841, he was their debtor, to the amount of £340. He became tenant of the Canteen under a lease granted by the principal officers of her Majesty's Ordnance, for and on behalf of her Majesty, of the one part, and the plaintiff, and Lamont and Stewart, as the sureties for the plaintiff, of the other part. The lease purported, in terms, to be "signed, sealed, and delivered, being first duly stamped." It was signed and sealed by all parties, but not stamped. On the 29th of January, 1841, the defendant, Stewart, with his clerk Jones, called at the Canteen, and inquired for the plaintiff, (who was absent). Stewart then went away, and shortly afterwards returned with Parnham, a broker, who took possession under a warrant of distress, signed and delivered to him by Stewart, authorizing him to levy off the goods of the plaintiff at the Canteen a distress for the sum of £84, being the amount of the rent due "to me," (the warrant said), "on the 31st of October, 1840." Then followed, on the warrant, the usual clause of indemnity, signed "J. D. Stewart, for Lamont, Stewart & Co."

Some of the plaintiff's family remained in the house till Tuesday, (2nd of February), and then they were ordered to quit by the barrack-master. The defendants afterwards

continued in possession by a servant, who acted under the direction of the defendant Jones.

The lease from the Board of Ordnance was put in ; and—

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Bompas, Serjt., objected, that it had no stamp.

TINDAL, C. J.—The lease is from the Crown. It is not necessary to shew that it is stamped. But the question for you is, can the defendants, (or at least two of them), who are parties to a lease from the Board of Ordnance, act as if they were landlords to the plaintiff?

There was not any evidence that Mr. Matravers was a partner in the firm of Lamont, Stewart & Co., though it was shewn that he was often about the brewery, giving orders as a partner.

TINDAL, C. J. (in summing up).—This is an action of trespass against four defendants, and the question is, how far the plaintiff is entitled to recover against all or any of them? The complaint is, that the defendants broke into his house and expelled him, and seized his goods. The defendants say, that they are not guilty of expelling or of seizing the goods. On the first plea, no doubt the defendants are entitled to a verdict; because, although they were not justified in entering into the plaintiff's house, yet they were not the persons who expelled him; it was the officer of the Board of Ordnance who did this, as he was entitled to do. The defendants only entered the house, and that not lawfully, but they did not eject the plaintiff. As to the distress, the question will be, whether all the defendants, or only some of them, are liable for the damages which the plaintiff has sustained? It was an illegal distress, because, being put in by Stewart, it was not for rent due to him but to the Board of Ordnance. He did right in his own view of the case, because he knew the Board of Ordnance might and would have come upon him for the rent due. Then for the liability of the various parties; the question is, which,

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or how many, or whether all of these defendants are to be affected by the verdict. Stewart is the moving cause in all that is done. Stewart and Lamont are shewn to be partners; but the evidence as to Matravers being a partner is not so clear. Jones is the servant of the firm, but he took an active part in the transactions. The first question then is as to partnership. One partner has no right to involve another, or to pledge him to a fact, unless in the ordinary course of business. As here, in this case of trespass, one partner cannot involve another in the same mischief; yet there may be exceptions even to such a case as this, where, for instance, the trespass is in the nature of a taking, which is available to the partnership, more especially if the other partners afterwards agree and consent to the act. It is a question, therefore, for you, seeing that, in point of fact, the distress was made by Stewart only, whether Lamont and Matravers did consent to this wrongful distress, so that they agreed it should be made, or did they afterwards so give their assent as to show that their minds were concurring. As to the defendant Matravers, there is another question, for it is yet matter of doubt whether he were a partner or not. This is not like a case in which the question is, whether A., B., and C. were partners on a just debt, but whether they were so as to concur in an unjust distress. The province of a jury, therefore, would be, not only to find, whether they were partners, but also by evidence before the transaction, that they all joined in ordering the doing of this act, or by evidence afterwards, that they concurred and received the benefit of it. The language of the distress warrant is this:—Stewart authorizes Parnham to distrain for rent due “to me,” he says, and then signs himself, “For Lamont, Stewart & Co.” The question is, Can he do this? One partner cannot drag another into a trespass without his previous consent or without his after concurrence. Then, for the fourth defendant, Jones: All persons in trespass who aid or counsel, direct, or join, are joint trespassers. The

question is, did Jones do more than as a clerk to Stewart, or was he so implicated, as to make himself a principal trespasser?

Verdict for plaintiff—Damages £90.

Stewart guilty: The other three not guilty.

Talfourd and *Channell*, Serjts., and *Bramwell*, for the plaintiffs.

Bompas, Serjt., *Whateley*, and *Taprell*, for the defendants.

[Attornies—*Harris*, and *Venning & Co.*]

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Sittings in London after Michaelmas Term, 1841.

BEFORE MR. JUSTICE ERSKINE.

(*Who sat for the Lord Chief Justice.*)

JACKSON and Another, Churchwardens, v. BOWLEY,
Executor of W. J. LYON.

ASSUMPSIT.—Declaration that the deceased in his lifetime was indebted to the plaintiffs, being churchwardens, &c., for money received by him for their use, and in consideration thereof promised, &c.; yet that the deceased in his lifetime had disregarded his promise, and so also had the defendant as his executor since

In an action against an executor, on plene administravit pleaded, the plaintiff is bound to shew affirmatively, that the defendant had goods of the testator

in his hands unadministered; and though the plaintiff is entitled to his verdict, (and therefore to costs), if he can prove any property unadministered, yet the measure of plaintiff's damages is not the amount of his debt, but so much as he can shew to remain in the hands of the executor.

Where the testator assigned his property, and the plaintiff, in an action against the executor, set up fraud in the assignment, and suggested, to prove the fraud, that the testator was insolvent at the time of the assignment, it is sufficient for the purposes of the plaintiff in the action, if, by the very act of assignment, the plaintiff make himself insolvent—that is, if the property left after the conveyance be not enough to pay his debts. But where the sum realized after the death of the testator, very nearly equalled the amount of his debts, his Lordship still left it to the jury to say whether there had been fraud in the assignment.

It is a question for the jury, whether the executor has committed a devastavit, by swearing the property above its value, and so incurring a greater stamp-duty than he would otherwise have to pay, seeing that the executor is bound to act promptly, and therefore is not to be held to too close a search for the testator's property.

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his death. Another set of counts, charging the defendant as executor. Particulars for 20*l.* 8*s.* 1*d.* Plea—Plene administravit, setting out that the defendant had fully administered all the goods which were of the deceased in his lifetime, and which have ever come to his hands as executor since the death of the testator; and that the defendant had not before nor since the commencement of this suit ever had any goods, &c., which were of the said W. J. L., as executor, to be administered beyond &c. Replication—Assets præter. That the defendant, at the commencement of this suit, had goods, &c., of the deceased in his hands, as executor, to be administered, to the value of the damages sustained &c., wherewith the defendant ought to have satisfied the said debt &c.

The plaintiffs were churchwardens of the parish of St. Benét Sherehog, and the deceased was parish-clerk of the united parishes of St. Stephen Walbroke and St. Benét Sherehog, and was vestry-clerk of the latter parish, and being such was employed by the churchwardens to collect the parish rates during the years 1839 and 1840; and he became in arrear in accounting to the amount of the sum claimed. The action was commenced the 22nd of October, 1840. The testator died in November, 1840, leaving a will to the effect that his wife should take a certain freehold at Brighton for her life, remainder to his nephew and niece William and Clara Lyon, their heirs, &c., also £500 to his wife, with other legacies; and by the will the defendant and T. Field were appointed executors. There was a codicil by which certain premises in Clerkenwell were bequeathed to the testator's niece Clara Lyon. The executor Bowley (the defendant) alone proved the will in July, 1841, and the property was sworn under £800. To rebut the plea of plene administravit, the plaintiffs showed, that a short time before the testator's death he was possessed of certain premises in Claremont Square which were let to a witness Catterell, that in the month of May before his death he executed a deed of gift of them to the defend-

ant in trust for Clara Lyon, in consideration of the natural love and affection which he bore towards her. Though the property was in Middlesex the conveyance was not registered. The testator was also possessed of the reversionary interest in certain other property in policies of insurance, assured to him by deed dated 1833, in consequence of money advanced by him. This also was transferred to the defendant in trust for Clara Lyon, by a deed dated June, 1840, but no notice of the transfer was given at the office till February, 1841. The deceased had an insurance on his house at Claremont Square and on the furniture and books it contained, for £1800. He removed a part of it to lodgings which he afterwards occupied, and the other part to the defendant's house, saying that he had given it to his sister, the defendant's wife.

In proof of the plaintiff's case, the deed of 1833, which shewed a part of the assets of the deceased, was produced.

Shee, Serjt.—It cannot be read as against the defendant, till the attesting witness is called.

Channell, Serjt.—If this action had been against the testator, if he had been alive, I need not have called the attesting witness.

The witness, who produced the deed, said that the security in question had been put into his hands by consent of all parties, at the time that the money was advanced by the deceased, and that he had kept the security ever since.

Shee, Serjt.—The deed is introduced by the plaintiffs for the purpose of proving their own case. The usual rule of *Nisi Prius* must be observed. If we had called for it the case might have been different; as it is, the attesting witness must be called.

Channell, Serjt.—This is not the case of a stranger pro-

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ducing a document; the person producing it is properly appointed to its custody by the deceased: I said before, that if Lyon had been alive, there could not have been any difficulty; here, instead of being produced by him, it is called for to be used as against his executor.

ERSKINE, J.—I think that makes the difference. I know of no case which goes the length now asked for. I am of opinion that we cannot see this deed.

The person to whom the money was lent by *Lyon*, was asked if *Lyon* had handed over his life policy as part of the security in the contract.

Shee, Serjt., objected to the question.—The policy is assumed to have been handed over as collateral security in a contract. If the contract were produced, it would appear under what circumstances the policy *was* handed over. The circumstances may have been such as to render the policy inadmissible in evidence.

The objection was allowed; but, before the trial was over, the attesting witness to the contract was able to attend.

Another witness proved, that, in 1837, he had lent £19 to the deceased, for which he could get no re-payment.

It was shewn, that, independently of the leases and the policies above mentioned, the property which had come to the defendant's hands allowedly as executor, was £92, and that he had administered £89 of it in various payments; among other things, £22. 13s. for the probate duty on £800, and £28. 18s. for funeral expenses.

Shee, Serjt., for the defendant.—The executor had not assets as executor. As to the property in Claremont Square, the presumption of law was that it was freehold; if so, it would not go to the executor; if it were leasehold, the plaintiffs should have shewn that it was of some assignable

value. Then, touching the assignments, the question for the jury would be, whether they were fraudulently made in such a manner as was contemplated by the 13 Eliz. c. 5, or whether they were such as the law would uphold. They were voluntary, no doubt; but, being in consideration of natural love and affection, they were not fraudulent of necessity. To make an assignment void, it must be both voluntary and fraudulent, as was held in *Shears* and *Another v. Rogers*, (3 B. & Ad. 362) (a). If that were so, the defendant took the property in question, not as executor to the deceased, but as trustee for Clara Lyon. It is admitted, that the assignments made by the deceased are valid, unless, at the time that he made them, he was in insolvent circumstances. The only proof of his insolvency is, that he did not pay a debt of £19, and this present debt of £20, for which this action was brought; and I submit that that is not such a default as for a jury to infer insolvency therefrom.

He then proved the sums realized under the different sales; such as the sale of furniture, the sale of books, &c., and the administration of the several amounts.

(a) *Shears* and *Another v. Rogers*, executor, &c., of *John Morgan*. To render a conveyance fraudulent within the stat. 13 Eliz. c. 5, the party, at the time of making it, must be indebted to the extent of insolvency. But when a person, owing £102 on a bond, wrote to the obligee that he and his wife were bound down by pecuniary embarrassments, and that the obligee's proceeding to extremities would render the debtor's wife, after his death, perfectly destitute; and a month afterwards, for a nominal sum of £10, and in consideration of natural love and affection, assigned a lease (of the value of £206) to A., in trust for his own benefit for life, and after

his death for that of one of his daughters-in-law; and he soon afterwards died, having by will made the assignee of the lease his executor; by which assignment of the lease, the residue of his property became insufficient to discharge the bond debt: it was held, that the assignment was within the meaning of the statute, and utterly void against creditors; and that the lease was assets in the hands of the executor. And in giving judgment *Patteson, J.*, said—"Whether the assignment was fraudulent or not depends on the question whether the party was insolvent at the time. The statement of the assets and debts, and the letter written at his desire by his attorney, shew that he was."

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Channell, Serjt., for the plaintiffs, in reply.—The conveyances were fraudulent. First, for the leaseholds—there were circumstances of suspicion attaching to them; among others, that the transfers were not registered according to law; with respect to the policies, there was no notice at the office given of their transfer till February, 1841, though the transfers were made in June, 1840. It is said that transfers, though voluntary, are not necessarily fraudulent; nor are they. But it is not necessary, on the other hand, that a man should *know* he is insolvent at the time he makes a voluntary assignment, in order to render that assignment fraudulent. Suppose a person have £1000, and owe £1000, which he may be called on to pay at any moment; if he, under these circumstances, give any portion of the property in his hands to any person to whom he is not a debtor, he is withdrawing his property from his fair creditors, he makes himself insolvent by that very act, and the transfer is void. Suggestions had been made as to the amount of the funeral expenses. The law allows but £10, when the estate of the deceased is insolvent. With respect to the amount of the probate duty, the value of this estate is now said to be not £100, and the duty would therefore be 10s. The executor had wantonly sworn it to be under £800, and had thus wasted the estate by incurring a duty of £15, which the plaintiffs were entitled to recover from him.

ERSKINE, J., in summing up.—The plea here is plene administravit; and the question is, whether, at the time of action brought, the defendant had any goods of the testator Lyon in his hands, which he had not administered. The plaintiffs are bound to show *that* affirmatively. The defendant must show that he administered all he had; and though the plaintiffs are entitled to a verdict, and, therefore, to their costs, if they can show that the defendant had one shilling of the testator's unadministered, yet the measure of the plaintiffs' damages is not the amount

of their debt, but only so much as they can show the executor has not administered, but has still in his hands. It has been shewn that the defendant received large sums of money; but he says he received them as trustee, and not as executor to the deceased. To prove that, certain deeds are offered in evidence. Lyon had a right to assign his property; but the law says, it is void as against creditors if done fraudulently. The plaintiffs attempt to prove that it was so done, by showing that, at the time of the conveyance, Lyon was indebted in two sums of £20 and £19; and that when the property in question was removed from the whole property which he had, there was not enough left to pay these two sums amounting to £39. The question is, what is meant by insolvency? If by the act of assignment the party makes himself insolvent, that is, if the property left after the conveyance is not enough to pay his debts, that is insolvency sufficient for the purposes of the plaintiff in this action. But inasmuch as there is no evidence that he owed more than £39, and as his property realized a sum so near the amount expended, even if that expense were all fair, it is still a question for you, whether the transfers above spoken of were *fraudulent*. Then if you think there has been no fraud here, the next question is, has the defendant fully administered all that came to his hands as executor? There is no evidence what the testator's property did realize. The executor is entitled to charge for decent funeral expenses; and what are decent expenses is a question for the jury. Then for the probate stamp, the question would also be on the point, whether there were reasonable ground for the defendant to swear the property under £800, (considering that he must act promptly (within a year); he perhaps ought not to be held to a close search of the testator's effects; or whether he, who knew so much of the affairs of Lyon, should not know that he could safely swear it to be under £100. If the jury were of the latter opinion, they would diminish a proportionate

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amount from the assets which were said to have been administered.

Verdict for plaintiffs, 20*l.* 8*s.* 10*d.*

Channell, Serjt., and *W. H. Watson*, for the plaintiffs.

Shee, Serjt., and *Petersdorff*, for the defendants.

[Attornies—*A. Jones*, and Messrs. *Walls*.]

Sittings in Middlesex in Hilary Term, 1842.

BEFORE MR. JUSTICE COLTMAN.

Jan. 26.

RUMSEY v. WEBB et UX.

The defendant spoke to the plaintiff's mistress words charging the plaintiff with irregularity in her conduct as a servant girl, in consequence of which the plaintiff lost her place. The only plea on the record was, Not guilty. It was held, that the defendant might, under that plea, disprove malice in the various methods by which it is usually disproved; yet that he was estopped from giving evidence of the truth of the facts as rebutting the malice, because he had not pleaded that the facts were true.

ACTION for slander of a servant, in her character of servant, whereby she lost her place. Plea, not guilty.—The plaintiff was servant to William Catling. It appeared that Mrs. Catling called on Mrs. Webb, and asked how her (Mrs. Catling's) sister had behaved to the plaintiff during Mrs. Catling's absence in the country; whereupon Mrs. Webb said, "Mrs. Catling, you are not aware what kind of servant you have, if you were you would not keep her; for I can assure you she is often out with our married man. She was out with him last Sunday morning, and, when you were in the country, she was out gossiping till 11 or 12 o'clock at night." The mistress upon this discharged her servant.

The witness, Mrs. Catling, said, in cross-examination, that she had, on a previous occasion, asked the defendant, Mrs. Webb, to look after her servant.

Though in such case the absence of the proof of special damage, (that the plaintiff thereby lost her place), cannot affect the verdict, yet the jury may consider it in assessing damages.

COLTMAN, J., refused to receive evidence of the truth of the words, (as the truth was not pleaded), on any ground, even to make out that the conversation was a privileged communication, or to shew that the defendant, Mrs. Webb, believed the words to be true (a).

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COLTMAN, J., in summing up, left it to the jury to say, first, whether the words were spoken as laid; and, secondly, whether they thought that this was done with the honest intent of giving a neighbour important information of what was going on in his family, or whether it was done in an idle, gossiping, and malicious spirit? His Lordship further said:—If a neighbour makes inquiry of another respecting his own servants, that other may state what he believes to be true; but the case is different when the statement is a voluntary act; yet, even in this case, the jury is to consider whether the words were dictated by a sense of the duty which one neighbour owes to another. If the jury thought that the plaintiff was not

(a) In *Roberts v. Camden* (9 East, 92), Lord Ellenborough, C. J., in giving judgment, said, "It has been settled, ever since the case of *Underwood v. Parkes*, (2 Stra. 1200), that the truth of the words cannot be given in evidence upon not guilty, but must be specially pleaded. In *Smith v. Thomas*, (2 Bing. N. C. 381), which was an action for words, the defendant pleaded, among other things, that the words were spoken in the course of a confidential communication, and that he believed the slander to be true, and *Tindal*, C. J., said, "The allegation, that the defendant did believe the words to be true, negatives undoubtedly that single ground of malice, but no more; the communication may have been malicious on various other grounds."

It was said by *Holroyd*, J., in

Fairman v. Ives, (5 B. & A., 645), that, "generally speaking, the truth of the facts which form the subject matter of the slander can only be given in evidence when specially pleaded; but in that case the speaking or publishing of the slander is not justified by the mere occasion on which it is spoken or published, but because it is true. By shewing the truth of the slanderous matter which is the subject matter of the action, you don't shew that it was not maliciously spoken or published, but merely that the party is not entitled to damages, because he is guilty of the charge imputed to him. On the other hand, by shewing that the slander was spoken or published on a justifiable occasion, you shew that it was not done maliciously, and that goes to the very gist of the action."

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dismissed in consequence of what the defendant Mrs. Webb had said, that might be considered in mitigation of damages, though it was not necessary to prove the special damage to make out a cause of action.

Verdict for plaintiff—Damages 10s.

His Lordship refused to certify to make the defendant pay all costs under the provisions of the 3 & 4 Vict. c. 24 (b).

Bompas, Serjt., and *Lush*, for the plaintiff.

Shee, Serjt., and *Swann*, for the defendant.

[Attornies—*Masterman & Austin*, and *R. Hodgson*.]

Afterwards, 29th of January, *Shee*, Serjt., moved for a rule to set aside the verdict, on the ground of rejection of evidence. But the rule was refused; and it was said by the Court, that, as the truth of the words was not pleaded, no evidence could be received to that end for any purpose.

(b) 3 & 4 Vict. c. 24, s. 2. "If the plaintiff, in any action of trespass or of trespass on the case, brought or to be brought in any of her Majesty's Courts at Westminster, or in the Court of C. P. at Lancaster, or in the Court of C. P. at Durham, shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have

passed by default, unless the judge or presiding officer, before whom such verdict shall be obtained, shall immediately afterwards certify, on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance, in respect of which the action was brought, was wilful and malicious."

PROMOTIONS.

IN the Vacation after Trinity Term, 1841, Sir *John Campbell*, Knight, her Majesty's Attorney General, was created a peer, by the title of Lord *Campbell*, and was appointed Lord Chancellor of Ireland, vice Lord *Plunkett*; and Sir *T. Wilde*, Knight, her Majesty's Solicitor General, was appointed her Majesty's Attorney General, vice Lord *Campbell*.

In the same vacation, *W. Whately*, Esq., *R. Godson*, Esq., *S. Sharp*, Esq., *C. J. Knowles*, Esq., and *M. T. Baines*, Esq., were appointed her Majesty's Counsel learned in the law. *C. Austin*, Esq., received a patent of precedence; and the Hon. *J. Stuart Wortley*, Esq., was appointed one of her Majesty's Counsel learned in the law.

In the same vacation, *J. V. Thompson*, Esq., was called to the degree of Serjeant at law.

In the same vacation, *A. E. Cockburn*, Esq., was appointed one of her Majesty's Counsel learned in the law.

In the same vacation, Lord *Lyndhurst* was appointed Lord High Chancellor of Great Britain, vice Lord *Cottenham*; Sir *Edward Sugden* was appointed Lord Chancellor of Ireland, vice Lord *Campbell*; Sir *F. Pollock*, Knight, was appointed Her Majesty's Attorney General, vice Sir *T. Wilde*, Knight; and Sir *W. W. Follett*, Knight, was appointed Her Majesty's Solicitor General.

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On the first day of Michaelmas Term, 1841, *J. L. Knight Bruce*, Esq., and *J. Wigram*, Esq., were appointed Vice-Chancellors, in pursuance of the stat. 5 Vict. c. 5, s. 19. They afterwards received the honour of knighthood, and were, by command, sworn of Her Majesty's Most Honourable Privy Council.

In the same term *E. Wilbraham*, Esq., *W. Matthews*, Esq., *J. H. Koe*, Esq., *J. G. Teed*, Esq., *W. L. Lowndes*, Esq., *T. Purvis*, Esq., *J. Walker*, Esq., *R. S. Parker*, Esq., *J. Russell*, Esq., *R. P. Roupell*, Esq., *T. O. Anderdon*, Esq., and *L. Wigram*, Esq., were appointed her Majesty's Counsel learned in the law.

In the same Term *C. Cresswell*, Esq., was appointed one of the Judges of the Court of Common Pleas, vice Sir *J. B. Bosanquet*, Knight.

OXFORD SUMMER CIRCUIT, 1841.

BEFORE MR. JUSTICE COLERIDGE AND MR. JUSTICE COLTMAN.

ABINGDON ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE COLTMAN.

REGINA v. ANN HEARN.

MISDEMEANOR.—The prisoner was indicted for having attempted to set fire to the house of Edmund Vidler, by setting fire to bed-furniture and bedding therein.

It appeared, that, on the afternoon of the 5th of May, 1841, the bed-furniture and bedding of two of the rooms in Mr. Vidler's house were discovered to be on fire, and soon afterwards a silver tea-spoon, a broken salt-spoon, and a padlock key were found in the sucker of the pump. It was proved by Mr. Vidler, that he said to the prisoner, (who had been in his service about a week), that, if she did not tell the truth about the things that were found in the pump, he would send for the constable to take her, but that he did not say anything to her about the fire.

A servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two of the bed-rooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner, that if she did not tell the truth about the things found in the pump he would send for the constable to take her, but he said nothing to her respecting the fire :—*Held*, that this was such an inducement to confess as would

COLTMAN, J.—I think that this is such an inducement to confess, that I ought not to hear what the prisoner said.

render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction.

The prosecutor proved, that when the prisoner was before the magistrate she was duly cautioned, and that she made a statement, which was taken down and read over to her, and to which she made her mark, the magistrate also signing it. The prosecutor identified the paper by his own signature to his own deposition, being on the same sheet of paper :—*Held*, that the prisoner's statement might be given in evidence without examining either the magistrate or his clerk.

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Carrington, for the prosecution.—Does your Lordship think that this excludes anything that the prisoner said respecting the fire?

COLTMAN, J.—I think it does. It is really all one transaction.

The evidence was rejected.

With a view of giving in evidence the statement made by the prisoner before Mr. Congreve, the committing magistrate, Mr. Vidler had the depositions put into his hand: he said, "I was present at the examination before Mr. Congreve, who told the prisoner that she was not obliged to say anything unless she chose, and he cautioned her not to say anything to criminate herself, as it might be used against her on her trial. She made a statement, which was taken down and read over to her by Mr. Congreve, and to which she made her mark. This is it. Mr. Congreve also signed it. I know it to be the same, as my own deposition with my signature to it is on the same sheet of paper." Neither the magistrate nor his clerk were in the assize town.

COLTMAN, J.—You may give the prisoner's statement in evidence (a).

It was read, and in it the prisoner stated that she had set the bed-furniture and bedding on fire in both the bed rooms, and that she had previously put the tea-spoon, the broken salt-spoon, and the padlock key into the sucker of the pump.

Verdict—Guilty.

Carrington, for the prosecution.

[Attornies—Gray & Godwin.]

(a) See the case of *Reg. v. Wilshaw*, post, p. 145.

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REGINA v. GEORGE and FORD.

HOUSE-BREAKING.—The prisoners were charged with having broken into the house of James Huggins, and with having stolen therein a pound of bacon and other articles. The prisoner George pleaded guilty, and the prisoner Ford not guilty.

On the part of the prosecution, evidence was given that a part of the stolen property was found in the possession of the prisoner Ford.

After making his defence, the prisoner Ford proposed to call the prisoner George as a witness, to prove that he (Ford) was not present at the committing of the offence. The prisoner George's plea of guilty had been recorded against him, but no sentence had been passed on him.

A. and B. were jointly charged in the same indictment with breaking into the house of J. H. and stealing his goods. A. pleaded guilty, and B. pleaded not guilty, and was tried. A.'s plea of guilty was recorded, but no sentence had been passed on him. B. wished to call A. as a witness for him: —*Held*, that he might do so.

COLTMAN, J.—The prisoner George may be examined, if the other prisoner wishes it.

The prisoner George was examined as a witness for the other prisoner.

The jury found the prisoner Ford guilty.

Bros for the prosecution.

[Attorney—*Blandy*.]

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OXFORD ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. TOLLETT and TAYLOR.

LARCENY.—The prisoners were charged with stealing two watches, six handkerchiefs, eleven sovereigns, seventeen half-sovereigns, six crown pieces, and two boxes, the property of Henry Eltham.

It was opened by *Keating*, for the prosecution, that it had been arranged between the prisoner Taylor and the wife of the prosecutor, that they were to elope together on the night of Saturday the 31st of October, 1840; and that the prisoner Tollett was to take them away to Gloucester in his cart, together with two boxes containing the property of the husband; and that, about midnight on Saturday the 31st of October, the prisoner Taylor came to the prosecutor's house, when the wife delivered to him the boxes containing the property mentioned in the indictment, which he put into Tollett's cart; but that the prosecutor's wife did not elope, because the prosecutor awoke and prevented her; however, instead of taking the property, he converted them to his own use, this is no larceny; but if the person to whom the goods are delivered by the wife be an adulterer it is otherwise, and an adulterer can be properly convicted of stealing the husband's goods though they be delivered to him by the wife.

If no adultery has actually been committed by the parties, but the goods of the husband are removed from his house by the wife and the intended adulterer, with an intent that the wife should elope with him and live in adultery with him, this taking of the goods is, in point of law, a larceny.

If a wife elope with an adulterer, who takes her clothes with them, it is a larceny; and it is as much a larceny to steal her clothes, which are her husband's property, as it would be to steal anything else that was his property.

If, on the trial of a man for larceny, the jury are satisfied that he took any of the prosecutor's goods, there then being a criminal intention, or there having been a criminal act between the prisoner and the prosecutor's wife, the jury ought to convict, even though the goods were delivered to the prisoner by the prosecutor's wife; but if the jury should think that the prisoner took away the goods merely to get the wife away from her husband as a friend only, and without any reference to any connexion between the prisoner and the wife, either actual or intended, they ought to acquit.

perty to Gloucester, the two prisoners went with it to Abingdon, where they were found with it on the morning of Monday, the 2nd of November.

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It was proved by the prosecutor, that, on his going to bed, at about 10 o'clock on the night of the 31st of October, the boxes, which before that had contained his wife's clothes, his own silk handkerchiefs, the two watches, and about £4 in money, were safe in his bed-room, and that he went to sleep; and that about midnight he awoke and saw his wife was up and dressed, and that the boxes were gone. In his cross-examination he said, that his wife and himself had been on bad terms, and that she had threatened to leave him and go to service.

Mrs. Emily Eltham said, "I am the wife of the prosecutor; I know both the prisoners. Before the 30th of October I had twice met the prisoner Taylor at Mrs. Hayward's in Oxford; I do not know that it is a house of ill fame; we were in a bed-room together both times, for as much as half an hour each time; nothing improper passed between us on either occasion; I went to tell him when I was ready to go away with him; it was arranged between us that I was to be ready by eleven o'clock on Saturday night the 31st of October; the boxes and money were to be ready; I told him no amount; he said he should come and take the boxes and me also; we were to go to Gloucester, and live together as man and wife; Taylor told me to bring all the money I could; I put more money into one of the boxes, it was £17; it was my husband's money. On the night of Saturday the 31st of October, Taylor came at twelve o'clock; he asked me to fetch the boxes, I said I could not; Taylor fetched them out of the room in which my husband was asleep; I was dressed; I had not gone to bed, and should have then gone off with Taylor, but my husband awoke, and that prevented me. Tollett had told me that Taylor had arranged with him to take me and my things to Gloucester."

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It was proved by Mr. Reynolds, the landlord of the King's Head and Bell at Abingdon, that the prisoners, whom he had known before, came to his inn in a cart with the boxes, at half-past six on the morning of Sunday the 1st of November; that they stayed there till Monday, when the prosecutor's father came and gave them into the custody of the police.

It was proved by the father of the prosecutor, that, in consequence of information given by the wife of the prosecutor, he followed the prisoners to Abingdon, and found them with the boxes, of which the contents were "all right;" and that in the boxes he found all the articles mentioned in the indictment. In his cross-examination he stated, that he found both the boxes locked, and that he unlocked them with keys given to him by the wife of the prosecutor, and found in them (besides the articles already mentioned) a quantity of woman's wearing apparel.

It was also proved, that the prisoner Tollett was seen near the prosecutor's house at one o'clock on the morning of Sunday the 1st of November.

The boxes were produced: they were large heavy boxes.

COLERIDGE, J.—I think that there is no evidence to affect the prisoner Tollett as a principal.

Carrington, for the prisoner Taylor.—Since the decision of the case of *Rex v. Tolfree* it is impossible to deny, that, if a married woman go off with an adulterer, and the guilty parties, at the time of the elopement, steal the money and plate of the husband, this is a larceny in the adulterer; although, before the decision of that case, an opinion had been not only entertained but acted upon, which went the length of holding that a person who took the goods of the husband by the delivery of the wife would not, under any circumstances, be guilty of larceny, and that it was immaterial whether the prisoner and the wife had

been guilty of adultery or not (a). However, taking the case of *Rex v. Tolfree* to its full extent, I submit that there

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(a) In the case of *Rex v. Tolfree*, M. C. C. 243, the prisoner, who had lodged in the house of the prosecutor, took away the prosecutor's wife, together with money and plate of the prosecutor to the value of 150*l.*, and wearing apparel and goods to the value of 70*l.* more: with this property the prisoner and the prosecutor's wife proceeded to the prisoner's lodgings, where they lived together (she passing as his wife) till he was apprehended.

The wife of the prosecutor was called as a witness for the prisoner, and swore that there was none of the property but what she had herself taken or given the prisoner to take.

It was objected on the part of the prisoner, 1st, that this was no larceny, as no previous adultery was shewn; and, 2nd, that, even if a previous adultery were shewn, it would be no larceny, for that the consent of the wife made it impossible that the prisoner could be guilty of felony in a joint taking with her. But the twelve judges held, "that this was larceny; for, though the wife consented, it must be considered that it was done *in viro domino*."

This case appears to overrule the case of *Rex v. Clark*, tried at the Old Bailey January Sessions, 1818, before Mr. Justice Park and Mr. Justice Abbott, which will be found in the Session Paper of that date, p. 65, and referred to R. & R. C. C. 376, n. (a).

Before the decision of the case of *Rex v. Tolfree*, it had been sup-

posed that the taking away a person's goods by the delivery of his wife, was not in any case a larceny, and was a civil trespass only; but in no one of the authorities on that subject, except the case of *Rex v. Clark*, is it at all suggested that the wife left her husband to live in adultery with the defendant.

In Fitz. N. B. 121, K., it is said, "If a man sueth in the spiritual court for taking and detaining from him his wife, lawfully married unto him, if the other sue a prohibition for the same, he shall have a consultation, forasmuch as for restitution of his wife only he sued, &c.; and yet he may have an action at the common law *de uxore abducta cum bonis viri*, or an action of trespass for taking the wife, as it seemeth." In Lilly's Entries, p. 441, is a declaration *in trespass* of E. T. 33 Car. 2, in a case of *Palmer, Esq., v. Trevor, Esq.*, for taking away the plaintiff's wife with his goods. There are several instances of actions *on the case* for harbouring the plaintiff's wife; and Mr. Chitty, in his Treatise on Pleading, vol. 2, p. 642, n. (a), after observing that a declaration for crim. con. may be properly framed *in case*, goes on to add, "When it may be doubtful whether the criminal conversation can be proved, and the defendant has been guilty of enticing away or harbouring the wife, it may be advisable to add counts for such injuries, and which may be framed as in the precedent in Willes, 578—580."

That precedent is in the case of *Winsmore v. Greenbank*, which was

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is no larceny in the present case, as it is distinctly proved that there has been no adultery committed, and that no elopement ever took place. In the case of *Rex v. Tolfree* the ground of the decision was, that the wife had eloped, and had committed adultery with the prisoner. Even admitting, for the sake of argument, that it would be a larceny for a man to take away the money or watches of a husband by the delivery of his wife, who intended to elope with him, there is no evidence that the prisoner knew that these large boxes contained either watches or money; for, the fact of his telling the prosecutor's wife to "bring" all the money she could, would tend rather to shew that she was to bring it with her, and was not to put it in these boxes; and if the prisoner did not know that these boxes contained valuables, and believed that they contained the clothes of the prosecutor's wife, I submit that he should be acquitted; and that it cannot be a larceny, even in an adulterer, to take away the wearing apparel of the woman with whom he elopes for her to wear after the elopement has taken place; for, if that were so, every defendant in every crim. con. case that ever was tried might have been tried for larceny in stealing the clothes of the woman with whom he eloped, more especially if, at the time she eloped with her seducer, she carried away in the carriage more clothes than she was actually wearing at the time, and yet no such indictment for stealing the clothes of a married woman under such circumstances was ever preferred, which it, no doubt,

an action *on the case*, for persuading and procuring the plaintiff's wife to continue absent from him; *per quod consortium amisit*, in which the plaintiff recovered 3000*l.* damages. There were also counts for harbouring and secreting the wife of the plaintiff. The case of *Philp v. Squire*, 1 Pea. N. P. C. 82, and *Berthon v. Cartwright*, 2 Esp. N. P. C. 480, were both actions *on*

the case, for harbouring the plaintiff's wife; and in the former Lord *Kenyon* held, that no action lay against the defendant if he received the wife on a *representation* by her that her husband had ill-used and turned her out of doors; and his Lordship said, "It is of no consequence whether the wife's representation was true or false."

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would have been, if the taking of wearing apparel, under such circumstances, was a larceny. If therefore the prisoner was not aware that the boxes contained more than the wearing apparel of the wife, I submit that the prisoner was not guilty of larceny in taking them away in the manner that has been proved. The keys of the boxes remained with the wife; and there is not the slightest evidence from which it can be inferred, that the prisoner ever attempted to break bulk, or in any way to convert any of the articles to his own use; and the whole of the evidence goes to shew that he merely kept the boxes and their contents for the wife of the prosecutor. If the prisoner had these boxes and their contents by the delivery of the wife, without any view to any adultery either committed or intended, it cannot be for a moment suggested that this is a larceny. Now there is no evidence of any adultery actually committed, and no evidence of any adultery being even intended, except that of the wife, who, as far as the adulterous intention (which is all she deposes to), was an accomplice, and as such would require confirmation.

COLERIDGE, J., (in summing up).—There is no doubt that the property found in the possession of the prisoner at Abingdon was the property of the prosecutor Henry Eltham, and that it was taken from his house on the night of Saturday, the 31st of October, and that it was found at Abingdon in the same state in which it was taken; and it seems also to be clear, that neither of the prisoners was in possession of the keys which unlocked the boxes. With respect to the prisoner Tollett, I think that the evidence is insufficient to affect him as a principal. The evidence, as it affects the other prisoner, is therefore that which you will principally have to attend to. It is proved by the prosecutor, that he and his wife had been upon bad terms, and that she had threatened to leave him and go to service; and the wife herself says, that she twice met the prisoner Taylor at Mrs. Hayward's, which she does not

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know to be a house of ill fame, and there arranged with the prisoner Taylor that she should elope with him, and that they should live at Gloucester as man and wife. She says, that on these two occasions she was with the prisoner in a bed-room for half an hour each time, but that nothing improper passed between them; she also says, that the prisoner Taylor desired her to bring all the money she could, and that she was to get the money and the boxes ready on the Saturday night, and he would come for them and take her away with him also. She further states, that she sat up after her husband had gone to bed in expectation of his coming; that he did come, and that she took him into the room in which her husband was asleep, and that he took the boxes away in the cart of the other prisoner, Tollett, and that if her husband had remained asleep she would have gone off with the prisoner Taylor; but as her husband awoke she was obliged to stay, and she gave information which led to the apprehension of the prisoners at Abingdon. Now by law there is such a unity of interest between husband and wife, that ordinarily the wife cannot steal the goods of the husband, nor can an indifferent person steal the goods of the husband by the delivery of them by the wife. If, therefore, the prisoner Taylor had been an indifferent person, and the wife of the prosecutor had delivered this money and these goods to him to convert to his own use that would in point of law have been no larceny. But if the person to whom the goods are delivered by the wife be an adulterer it is otherwise, and an adulterer can be properly convicted of stealing the husband's goods though they be delivered to him by the wife. On this evidence, it does not appear that the criminal purpose had been carried into effect; but if that criminal purpose had not been completed, and these goods were removed by the wife and the prisoner Taylor with an intent that she should elope with him and live in adultery with him, I shall direct you in point of law that the taking of them was a larceny. Mr. Carrington has said, that if

the wife eloped with an adulterer it would be no larceny in the adulterer to assist in carrying away her clothes. I do not agree with him, for I think that if she elopes with an adulterer, who takes her clothes with them, it is larceny to steal her clothes, which are her husband's property, just as much as it would be a larceny to steal her husband's wearing apparel, or anything else that was his property (b). However, the evidence in this case goes further than that; for it is proved that the prisoner told her to bring with her all the money that she could, and a sum of money is contained in one of the boxes. Mr. Carrington also contends, that, except on the evidence of the wife, there is no proof that the prisoner Taylor was anything more than a friend; and if there was a larceny in the stealing of these goods the wife is an accomplice, and requires confirmation. Taking that to be so, we find that she is confirmed as to all the main facts of the case; and she certainly appears to have no motive to blacken her own character; and it seems reasonable, therefore, to believe her as to the criminal intention on her part. Mr. Carrington also says, that the conduct of the two prisoners was not that of thieves, as they stayed at Abingdon where they were known; and that certainly ought to weigh in favour of the prisoners. It is also said, that they did not break bulk; but I think that that does not amount to much, because, if the scheme was for the wife of the prosecutor to live with the prisoner Taylor at Gloucester, there would be no object in opening the boxes at Abingdon. It is further said, that Taylor did not know what was in the boxes; however, if a man take away any property at all belonging to another, having arranged to elope with the wife of that other, and having told the wife to bring all the money she could, it will be

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(b) In the case of *Carn v. Brice*, Law Jour. Exch. vol. 10, p. 28, and 7 M. & W. 183, it was held, that wearing apparel bought by the wife, out of an income settled in the

hands of trustees to her sole and separate use, might be taken in execution for a debt of her husband, under an execution sued out against him.

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for you to say whether he did not intend to steal the property thus taken away, though he might not at the time of the taking know exactly of what the property consisted. If you are satisfied that the prisoner Taylor took any of the husband's property, there then being a criminal intention, or there having been a criminal act between that prisoner and the wife, it is a larceny, and you ought to find the prisoner guilty; but if you think that the prisoner took away the boxes merely to get the wife away as a friend only, and without any reference to any criminal connexion between the prisoner and the wife, either actual or intended, you ought to acquit him.

The jury found the prisoner Taylor, Guilty;
and the prisoner Tollett, Not guilty.

Keating, for the prosecution.

Carrington, for the prisoners.

[Attornies—*Walsh*, and *Looker*.]

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WORCESTER ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. ANDREWS.

HOUSEBREAKING.—The indictment, after charging the breaking and entering the house in the usual form, charged that the prisoner “forty-two pieces of the current gold coin of the realm, called sovereigns, of the value of £42, in the same dwelling-house then and there being found, *then and there* feloniously did steal, take, and carry away,” &c.

An indictment for housebreaking, after charging the breaking and entering in the usual form, charged that the prisoner “forty-two pieces of the current gold coin of this realm, called sovereigns, of the value of £42, in the same dwelling-house then and there being found, *then and there* feloniously did steal and carry away,” &c. :—*Held*, good, and that the words “then and there” in the last allegation, were sufficient without the words “in the same dwelling-house” being added to them.

Greaves, for the prisoner.—I submit that the indictment is bad, as it does not sufficiently aver the stealing to have been in the dwelling-house. The words “then and there” merely amount to the same as the words “to wit, on the day and year aforesaid, in the parish aforesaid, in the county aforesaid;” and the present indictment ought to have run “then and there, *in the same dwelling-house*, feloniously did steal, take, and carry away,” &c. In the case of *Regina v. Smith (a)*, which was tried at Liverpool before Mr. Justice *Patteson*, the indictment charged that the prisoner broke into a shop, and two saws, “of the goods and chattels of the said J. S., *in the shop* then and there being found, feloniously did steal, take, and carry away,” &c. It was objected by Dr. *Brown* for the prisoner, that the prisoner could only be convicted of simple larceny, as the indictment did not distinctly aver the goods

(a) 2 M. & Rob. 115.

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to have been stolen *in the shop*. Mr. Justice *Patteson* allowed the objection. The words of the 15th section of the stat. 7 & 8 Geo. 4, c. 29, as to breaking into shops, being precisely the same as those of the 12th section relative to house-breaking.

COLERIDGE, J.—I had occasion to mention that case to my Brother *Patteson*, and he seemed to think the decision was incorrect. I think the present indictment is sufficient (*b*).

The prisoner was acquitted on the merits.

F. V. Lee, for the prosecution.

Greaves, for the prisoner.

[Attornies—*Cooke*, and *Fryzer*.]

(*b*) See the case of *Reg. v. Page*, 9 C. & P. 756.

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STAFFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE COLERIDGE.

DOE on the Demise of MARY SALT, the Administratrix
of THOMAS SALT, v. CARR.

EJECTMENT to recover a cottage and garden, situate
at the parish of Dilborne.

It appeared that John Salt, being seised in fee of the cottage and garden, died, leaving a widow and ten children him surviving, and by his will, duly executed, devised the cottage and garden to his wife Ann Salt for life, and at her death equally among his children; but by his will he gave his widow power to sell or mortgage the property, which power was in the following terms:—"And if the fund arising from my real and personal estate is not sufficient for the maintenance of my loving wife, then I give her liberty to sell or mortgage all or any part of my real or personal estate of what nature or kind soever."

It further appeared, that John Salt died in the year 1820, and that in the year 1828 his widow executed a

A person devised real property to his widow for life, and after her death to his children equally, with a power to the widow to mortgage or sell, in case "the fund" arising from the real and personal estate of the testator was not sufficient for the maintenance of the widow. The widow executed a mortgage of the property for £30 to her son T., and it was proved

that four years before the mortgage T. advanced his mother a sum less than £1 to pay a poor's rate that she was unable to pay. The subscribing witness to the mortgage deed had acted as attorney both of the widow and T. respecting it:—*Held*, that, on the trial of an ejectment by the administratrix of T. to recover the property under the mortgage deed, the subscribing witness might be cross-examined to show that the sum of £30, mentioned in the mortgage deed, and in the receipt at the back of it, was never in fact advanced.

Held, also, that it was for the jury to say, whether the widow was in such circumstances as to come within the terms of the power, and had had the money really advanced to her, or whether the mortgage was a device to get an advantage to one of the sons, the widow not being in circumstances to require the advance, and in fact never having received the money; and that in the former case the power would be well executed, and in the latter not.

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mortgage for 1000 years for £30 to her son Thomas Salt; and in the mortgage deed it was recited, that the mortgage was given in consideration of £30, and there was a receipt for the sum of £30 indorsed on the deed. It further appeared, that both the widow of John Salt and her son Thomas Salt were dead, and the present ejectment was brought by the lessor of the plaintiff, as the administratrix of Thomas Salt, to recover possession of the property under the mortgage deed.

It was proved, on the part of the lessor of the plaintiff, that, in the year 1824, Ann Salt, the widow, was in indigent circumstances, and had asked pecuniary assistance from her son Thomas the mortgagee, she being unable to pay her poor's rate, and that her son Thomas after at first declining to assist her, unless she would give him a security on the land, advanced her a sum less than twenty shillings.

To prove the execution of the mortgage deed by Ann Salt, Mr. Blagg, the attesting witness, was called. He stated that he had acted as the solicitor of both Thomas Salt and his mother, in the matters relating to this mortgage.

It was proposed by *Corbett*, for the defendant, to shew, by the cross-examination of Mr. Blagg, that no money was in fact advanced at the time of the execution of the mortgage deed.

Whateley, for the lessor of the plaintiff.—I submit that Mr. Blagg cannot be examined as to this: first, on the ground that Mr. Blagg having acted as the attorney of Thomas Salt, he cannot be allowed to give evidence of what passed between himself and his client, to destroy the validity of the mortgage that he had prepared for his client; and, secondly, on the ground that parol evidence cannot be received to contradict the recitals in the mortgage deed, and the receipt on the back of it, as to the advance of £30 by Thomas Salt.

Corbett, for the defendant.—I submit, that as Mr. Blagg was the attesting witness, he is the proper person to be asked as to what passed at the execution of the deed. I submit also, that the defendant is entitled to the benefit of this evidence, as this is not an examination as to any confidential communication between Mr. Blagg and his client, but an examination to ascertain the circumstances attending the execution of a deed. With respect to the second point, I submit, that as the defendant is no party to the deed, and claims adversely to it, he is not concluded by any recital contained in it, and that he is at liberty to shew by the parol evidence of the subscribing witness, that the consideration is not correctly stated in the deed, and also to shew in like manner what the consideration really was.

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COLERIDGE, J.—I think that Mr. *Corbett* is entitled to go into the examination he has proposed, and that the objection cannot be supported on either of the grounds put by the learned counsel for the lessor of the plaintiff (a).

The questions were put, and Mr. Blagg stated that no money was advanced by Thomas Salt at the time the mortgage deed was executed; and that he had pointed out to Mrs. Salt the advantage she was giving to her son Tho-

(a) In the case of *Call, Bart., v. Dunning*, 4 Ea. 53, the plaintiff proposed to prove the execution of a bond, by putting in the defendant's answer to a bill of discovery, on which the defendant admitted the execution of the bond; but it was held that the proof was not sufficient without calling the subscribing witness; and Mr. Justice *Le Blanc* said, "A fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction." In the case of *Cronk v. Frith*, 9 C. & P. 197, it was held, that, to prove the execution of a bond, it was necessary to call the subscribing witness, though he had become blind; Lord *Abinger* observing that "he might, from his recollection of the transaction, give most important evidence respecting it."

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mas, by granting this mortgage when the money had not been actually advanced; when Mrs. Salt replied, that she could trust her son Thomas, and that it had been arranged that he should keep an account of monies advanced by him to her from time to time, and that she should give vouchers. It was further stated by Mr. Blagg that the sum of £30 was mentioned, not with reference to any sum of money actually advanced, but as the estimated value of the cottage and garden.

No evidence was given of any payment or advance made by Thomas Salt to or on behalf of his mother, except the sum before mentioned, which was advanced in the year 1824.

Corbett, for the defendant.—I submit that the evidence given on the part of the plaintiff does not shew the execution of a valid mortgage, under the power given to Ann Salt by the will of John Salt. A mortgage by Ann Salt cannot be valid, unless the power has been strictly pursued. It has not been sufficiently shewn either that Ann Salt was, at the time of the execution of the mortgage, in a state to avail herself of this power, or that the sum stated by the mortgage deed to have been advanced has ever been so. I submit, that, under this will, Ann Salt had no power to give one child the advantage of a mortgage security, either for a sum not really advanced, or advanced under circumstances and for purposes not authorized by the power, and this mortgage, if granted by her for any other purpose, would be a legal fraud upon the other children who were entitled to an equal division of the property on the death of the mother, or at all events to such part of it as had not been mortgaged or sold by a due execution of the power.

COLERIDGE, J., (in summing up).—You will say whether you are satisfied that Ann Salt was in want of necessary support, (as contemplated by the will of her husband),

when she executed this mortgage-deed, and that advances of money had been made by her son Thomas for her support; for, if so, you ought to find for the plaintiff; but if you should think that this was an endeavour on her part to afford her son Thomas an unfair advantage, either by giving him this mortgage at a time when she was not in a situation to require advances from him, or by giving him a mortgage to secure money which he had in fact not advanced to her, you then ought to find for the defendant.

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Verdict for the defendant.

Whateley, and *F. V. Lee*, for the plaintiff.

Corbett, for the defendant.

[Attornies—*R. Lowe*, and *Blagg*.]

FORMAN v. DAWES and PARTRIDGE.

TRESPASS for taking two chairs and a table. Plea,
Not guilty.

On the trial of
an action
against officers
of a court of re-
quests, the Nisi
Prius record

As soon as the pleadings were opened, it was suggested

contained only a plea of not guilty, without the words "by statute" being added. The defendant's counsel wished to amend, by adding the words "by statute" to the Nisi Prius record. The judge would not allow the amendment, as it could not be shewn that the words "by statute" were on the defendant's plea; but *semble*, that, if it could have been shewn that the words "by statute" had been in the issue delivered by the plaintiff's attorney, the judge would have allowed the amendment.

A. brought an action of trespass against B., for taking two tables and a chair. B. pleaded not guilty, and no other plea. It was proved that B. took two chairs and a table in the house of D., but none of the witnesses knew A.; and there was no evidence of any kind to connect A. with the goods taken in D.'s house:—*Held*, that, to entitle the plaintiff to recover on these pleadings, there must be some evidence to connect the plaintiff with the goods taken; and that, if there was no such evidence, the defendant would be entitled to a verdict on his plea of not guilty.

If the counsel for a party rely on an act of Parliament, and cite it as an act to be judicially noticed, the opposite party has no right to insist that the counsel citing it should produce a copy of it printed by the Queen's printer.

The witness, who served a notice of action, did not know the handwriting of the plaintiff, whose signature the notice purported to bear; and no evidence was given of the plaintiff's handwriting:—*Held* sufficient without such proof, as it was enough that the notice should have been served on the plaintiff's behalf.

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by *Talfourd*, Serjt., for the defendants, that the plea of the defendants was "by statute," as the defendants were officers of the Wolverhampton Court of Requests, and meant to justify under the stat. 48 Geo. 3, c. cx., (loc. and pers.). However, on the *Nisi Prius* record being referred to, the words "by statute" were not to be found.

Talfourd, Serjt., asked for leave to amend, by adding the words "by statute" on the *Nisi Prius* record.

COLERIDGE, J.—How am I sure that the words were on your plea. Have you the issue which was delivered by the agent for the plaintiff's attorney.

Talfourd, Serjt.—It is not here, but we have the close copy of the plea, in which the words "by statute" appear.

COLERIDGE, J.—I cannot amend, unless you can shew that the words "by statute" were on your plea. But if they were, and are omitted on the *Nisi Prius* record, you must apply for a new trial, and that will no doubt be granted; and the person by whose default the omission was made, will probably have to pay all the costs.

No amendment was made.

It was opened by *Ludlow*, Serjt., for the plaintiff, that the goods in question, which consisted of two chairs and a table, were taken by the defendants in the house of a person named Dumelow, who was the brother-in-law of the plaintiff; the articles in question having been, with other goods, bought by the plaintiff, when they had been taken by the sheriff of Staffordshire under an execution against Mr. Dumelow.

The taking of the goods by the defendants was proved; and a sheriff's officer named Perkes proved that he had previously taken those goods, with others, under an execu-

tion against Mr. Dumelow, and that these articles, with the other goods taken, were valued by him at £82, which sum was paid for them by Mr. Dumelow, who stated at the time that the goods were bought by his brother-in-law, the present plaintiff: this witness further stated, that he never saw the plaintiff on the subject, and did not know him; but that Mr. Dumelow went from home and returned with the £82.

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COLERIDGE, J.—What evidence is there that these goods are the plaintiff's, or even, that any such person is in existence.

Ludlow, Serjt.—There is no denial of the property.

COLERIDGE, J.—I think you must give some evidence to connect the plaintiff with this property. It is taken at the house of Mr. Dumelow, and the mere proof of the taking of two chairs and a table at Mr. Dumelow's, is not of itself enough to give the present plaintiff a right of action, even on the plea of the general issue.

Ludlow, Serjt.—I will call Mr. Dumelow.

Mr. Dumelow was called.—He stated that the plaintiff was a hop-merchant at Derby; that he had himself married the plaintiff's sister, and that he, being in embarrassed circumstances, and having his goods, (including the articles in question), seized by Perkes, the sheriff's officer, under an execution, he had applied to the plaintiff for assistance, and the plaintiff had bought the goods at the sum of £82, for his sister and her children to have the use of them.

Talfourd, Serjt., objected that the defendants were entitled to notice of action under the 52nd section of the Wolverhampton Court of Requests' Act, (48 Geo. 3, c. cx., loc. and pers.), under which he should prove that they had acted.

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Busby, for the plaintiff.—The learned Serjeant has no right to refer your Lordship to any copy of the act, except one printed by the Queen's printer. The copy that he has referred to is not so; it is a privately printed copy.

Talfourd, Serjt.—By the 53rd section of the act, it is enacted, "That this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded."

COLERIDGE, J.—If counsel tells me that there is such an act, which is to be deemed a public act, I cannot call on him to produce a copy of it printed by the Queen's printer (*a*). With respect to those acts of Parliament, which declare that copies, purporting to be printed by the Queen's printer, may be given in evidence, it is different.

Evidence was given, that a notice of action was served on each of the defendants, and that the notices purported to be signed by the plaintiff; but the witness who served them, stated that he received them from Mrs. Dumelow, and that he did not know the plaintiff's handwriting.

Talfourd, Serjt.—How does it appear that the notices came from the plaintiff?

COLERIDGE, J.—I think it is enough, if it is a notice served on his behalf.

Talfourd, Serjt., addressed the jury for the defendants, and argued, that the goods really belonged to Mr. Dumelow, and that his brother-in-law had merely advanced him the money to pay out the execution.

(*a*) This is not likely to cause any real difficulty, as the local and personal acts, which are to be judicially noticed, will be found in all the superior courts, and are sent to the clerks of the peace of the different counties, and can be procured at the office of the Queen's printers.

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COLBRIDGE, J. (in summing up).—It has been suggested by Mr. Serjt. *Ludlow*, on the part of the plaintiff, that as there is no plea, except a plea of not guilty, the plaintiff would be entitled to recover in this action without the evidence of *Dumelow*. I think that is not so; for although on these pleadings the property is not put in issue, yet I think that a stranger, who was wholly unconnected with the goods and with the possession of them, could not recover in this action, even as these pleadings are shaped. However, the evidence of *Dumelow* gives the case a very different complexion. He says that he married the sister of the plaintiff, and that, having got into difficulty, he applies to his wife's brother to help him, and he does so. Then we come to the mode in which the relief was given, which was either that *Dumelow* merely borrowed the £82, or that the brother-in-law bought the goods and made them his own, to protect them for his sister and her children to have the use of them. Is not the latter a most probable way for the thing to have occurred in. If the plaintiff merely lent the money, the goods might be seized the next day under another execution, and the plaintiff lose £82. If he bought the goods, he protected them for his sister's use, and that of her children; and if you believe the evidence of *Dumelow*, the plaintiff has made out his case.

Verdict for the plaintiff—Damages 1*s*.

Ludlow, Serjt., *Price*, and *Busby*, for the plaintiff.

Talfourd, Serjt., and *W. J. Alexander*, for the defendants.

[Attornies—*Watts*, and *Willim*.]

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REGINA v. YATES.

A. brought an action against B. and his partners, for the price of wheat, and recovered a verdict on the bought and sold notes. B. and his partners filed a bill in equity against A., which stated, that the bought and sold notes did not contain all the terms of the contract, as it had been also agreed by parol between A. and B., that the wheat should be paid for by a draft at three months; and the prayer of the bill was, that A. should be restrained from suing out execution. A., by his answer, denied the statement in the bill; and the bill was dismissed:—*Held*, that, if this denial by A. was wilfully false, it amounted to perjury.

Held, also, that B. was a competent witness on an indictment against A. for perjury, alleged to have been committed in the answer, although A. had engaged to indemnify his partners from the expenses of the suit in Chancery.

The rule, that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction.

PERJURY. The indictment consisted of thirteen counts. The first count stated in substance that, on the 26th of April, 2 Vict., Edward Bourne Lovell, Samuel Willis, John Chamberlain Barlow, Charles Edge, and Samuel Wilson Suffield, exhibited their bill in Chancery against the present defendant, and in their bill stated to the effect following: that is to say, that the plaintiffs in the bill were Directors of the Bilston Union Mill Company; and that on or about the 7th of August, 1838, E. B. Lovell was a passenger on the rail-road from Liverpool to Stafford, and that the defendant was a passenger in the same carriage with him; and that it was then agreed between the defendant and E. B. Lovell, that the defendant should sell to E. B. Lovell, on the part of the said Company, 756 imperial quarters of white Dantzic Wheat, at 72s. 6d. per quarter, and that the wheat should not be paid for in cash, but by draft on the complainants at three months' date; that this agreement was never reduced into writing, but that on the following day the defendant requested E. B. Lovell to sign a bought note for the wheat, which he did; but that the bought note did not contain, or purport to contain, fully the terms of the agreement. The indictment then went on to recite several letters that had passed between the parties, as they were set forth in the bill in Chancery, and stated also from the bill in Chancery that the defendant brought an action in the Court of Exchequer against the complainants, which came on for trial at the Stafford Assizes on the 16th day of March, 1839; and that a verdict

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was obtained by the present defendant for 456*l.* 11*s.* 5*d.* and costs; "and that the said John Yates was enabled to obtain such verdict by reason of his fraudulently concealing the true terms of the said agreement;" and that the complainants by their bill prayed that the present defendant might set forth, [inter alia], whether it was not agreed between the present defendant and the said E. B. Lovell, that the wheat should be paid for by a draft on the said complainants, at three months' date; and that the present defendant "might be restrained from suing out execution upon the said verdict, and from recovering any benefit or advantage therefrom, or if he should be enabled in the first instance to sue out execution, and recover the amount thereof from the said complainants, that he might be decreed, under the circumstances aforesaid, to pay back to the said complainants the full amount that he might recover and receive under such execution." The indictment then went on to state, that the present defendant put in his answer to the bill, and was sworn before certain commissioners, (naming them), concerning the truth of the matters of the said answer; and that he did therein falsely swear, amongst other things, in substance as follows, that is to say, "the said John Yates denied that it was part of the terms of the said contract in the said bill of complaint mentioned, that the purchase-money should be paid by a draft on the said complainants at three months' date, or at any other date, the proposal for taking such bill in lieu of immediate payment not having been made by the said E. B. Lovell to him the said J. Yates, to the best of his the said J. Yates's memory and belief, until about a week after the said contract was entered into," as by the said answer of him the said John Yates remaining filed as of record in the said Court of Chancery, amongst other things, more fully appears; which said several matters, so sworn and affirmed by the said John Yates in his answer to the said bill of complaint as aforesaid, were and each of them was material and pertinent to the due investigation

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and ascertaining of the truth of the matters in the said bill of complaint complained of. Whereas, in truth and in fact, it was part of the terms of the said contract in the said bill of complaint mentioned, that the purchase-money for the said wheat should be paid by a draft on the said complainants at three months' date." This count contained several other assignments of perjury, and the twelve other counts of the indictment charged the perjury upon different parts of the defendant's answer, and some of them executed the bill in a more concise form.

Plea—Not guilty.

The indictment had been removed by certiorari, and came on to be tried at Nisi Prius.

It was opened by *Whateley*, for the prosecution,—Mr. Yates, who is a corn dealer, had brought an action against the Bilston Union Mill Company, (of which company Mr. Lovell, the prosecutor of the present indictment, was a director), upon a contract made by Mr. Lovell, on behalf of the Company, to buy 756 imperial quarters of white Dantzic wheat; and on the trial of that action before Baron *Gurney*, at the Stafford Summer Assizes of 1840, the bought and sold notes were given in evidence, and the present defendant obtained a verdict for 465*l.* 11*s.* 5*d.*; and the directors of the Bilston Union Mill Company afterwards filed a bill in the Court of Chancery, in which it was stated that the contract consisted of other terms, which were mentioned in a conversation which took place between Mr. Lovell and the present defendant, while they were travelling by the Grand Junction Railway; and by the bill it was prayed that it might be declared that one of the terms of the contract was, that the purchase-money should be paid by a bill of exchange, payable three months after date, and that the present defendant should be restrained from proceeding on his judgment in the action at law. To this bill the defendant put in an answer denying the parol agreement stated in the bill, and the bill was dismissed; and that

denial by the defendant so contained in the defendant's answer was the subject of the present indictment for perjury.

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Ludlow, Serjt., for the defendant.—I submit that the present indictment cannot be sustained, as it is founded on a matter upon which no perjury can be assigned. The only legitimate evidence of the contract is the bought and sold notes. The subsequent contract by parol is void by the Statute of Frauds, and a false answer to a bill, for the discovery of such a contract, will not, (as I submit), subject a party making it to an indictment for perjury, the assignment of perjury being upon an allegation which is immaterial to the matter before the Court of Chancery. In the case of *Rez v. Dunston* (a), which was an indictment for perjury committed in an answer in Chancery, it appeared that the answer had been put in to a bill filed for a specific performance of an agreement relating to the purchase of land. The defendant in his answer relied on the Statute of Frauds, the agreement not being in writing; and in his answer the defendant also denied having entered into any such agreement. Upon this denial in his answer the defendant was indicted for perjury; and it was held by the Lord Chief Justice *Abbott*, that the denial of an agreement, which, by the Statute of Frauds, was not binding on the parties, was immaterial and irrelevant, and that the defendant was entitled to his acquittal (b).

COLERIDGE, J.—In that case the bill in Chancery was to

(a) R. & M. N. P. C. 109.

(b) In the case of *Rez v. Dunston*, the case of *Bartlett v. Pickersgill*, 4 Burr. 2255, and 4 East, 577, n. (b) [from the notes of Mr. Justice *Aston*], was cited, the defendant in that case having been convicted of perjury, for the denial of a parol agreement for the purchase of an estate, which parol

agreement the Court of Chancery refused to enforce. But with respect to that case, L. C. J. *Abbott* said, "It does not appear from the very short statement of the case which has been cited, and which is not very distinctly reported, whether the Statute of Frauds was there pleaded and relied on.

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enforce the performance of a parol contract, which could not be enforced by reason of the Statute of Frauds; and the case of *Rex v. Benesech* (c) proceeded on the same ground. Though it is true that a party cannot vary the terms of a written contract by parol evidence, he may shew by such evidence that he was induced to sign the written contract inadvertently and by fraud. In this case the object of setting up the parol terms of the contract is for the purpose of avoiding the contract on the ground of fraud.

Whateley, for the prosecution.—The bill in equity does not deny the written contract, but sets up that the plaintiff was not in a condition to enforce it, because there were other terms agreed upon between the parties.

COLERIDGE, J.—The practice in a criminal case is, that, when the Judge has not a clear opinion upon an objection taken on behalf of a defendant, he should overrule it; because, if his opinion be wrong it can be set right afterwards, whereas, if he give a wrong opinion in favour of the objection, injustice would be done which could not be remedied. I say this, however, without intending to intimate that I entertain a doubtful opinion upon this question. I think that the principle, that parol evidence is inadmissible to contradict or vary the terms of a written contract, does not apply where the object of that evidence,

(c) *Peake*, Add. Ca. 93. In that case the perjury was assigned on an answer to a bill in Chancery, which stated that when the plaintiff was about to marry the niece of the defendant, the latter promised to pay him £1000 as a portion. The defendant in his answer insisted, that, as there was no promise in writing, he was entitled to the benefit of the Statute of Frauds;

and as to the fact, he denied the promise. On this denial, perjury was assigned. Lord *Kenyon* said, that "he thought this was not such a material fact as would support the indictment. This promise is absolutely void; and supposing it in fact to have taken place and been acknowledged by the defendant, that Court had no power to decree a performance of it."

as in this case, is to impeach the transaction on the ground of fraud. I think that the assignment of perjury on the denial in the answer of the parol terms, which the bill prayed to have established, is material and relevant; and I think, therefore, that the objection cannot be sustained.

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On the part of the prosecution Mr. Lovell was called as a witness. He stated on the voir dire that he had engaged to indemnify his partners from the expenses of the suit in Chancery.

Ludlow, Serjt.—I submit that this witness is not competent. In the case of *Rex v. Dalby* (d) it was held,

(d) See Pea. N. P. C. 12. In that case Lord *Kenyon* said, "This witness is certainly not competent to give evidence in this cause, as he is clearly interested in and may derive a benefit from the event of it, for, should this defendant be convicted, he being the only witness to support the verdict, the Court of Chancery upon having this new matter stated in a new or supplemental bill, would order the money to be refunded." It, however, appears, that in the case of *Bartlett v. Pickersgill*, cited ante, p. 59, n. b. Lord Keeper *Henley* dismissed a supplemental bill filed under such circumstances, and the authority of the case of *Rex v. Dalby* seems to be considerably shaken, if not overruled, by the decision of the Court of Queen's Bench, in the case of *Rex v. Boston*, 4 East, 572, where perjury had been assigned on a defendant's answer to a bill in the Exchequer; and the plaintiff in the suit was held to be a competent witness in

support of the indictment for perjury, although the equity suit was still pending. Mr. *Starkie* says, (Law of Ev. Vol. I., p. 152): "It was formerly held, very generally, that the party defrauded was not a competent witness upon an indictment for the fraud, except in some instances ex necessitate; and therefore, that the plaintiff was not competent to prove the perjury of the defendant in his answer to a bill of the witness in equity. Such decisions seem to have been founded on the supposition that the verdict would be admissible evidence for the witness in a subsequent proceeding, so as to entitle him to a remedy for the injury, or to protect him against the effects of the fraud. But this doctrine has long been exploded; and it seems now to be perfectly settled, that the record of conviction would not be admissible evidence in any civil proceeding. In the case of *Rex v. Broughton*, (2 Str. 1229), which was a prosecution for perjury,

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that the person who has been charged with a sum of money by the perjury of the only witness examined, and has filed a bill for relief, is not a competent witness on an indictment for that perjury, though he has since paid the money.

COLERIDGE, J.—The facts in the two cases are different. In that case the alleged perjury was committed in giving evidence on a trial of an action for usury, and the prosecutor on the indictment had filed his bill in the Court of Chancery, stating that the verdict was obtained by the perjury of Dalby, who was the only witness examined on the trial for the usury, and praying an injunction. There the fate of the bill in Chancery might possibly have depended on the result of the indictment. In the present case the perjury is assigned upon the answer to a bill upon which a decree has been made.

Mr. Lovell was examined.

The evidence of Mr. Lovell went in support of all the assignments of perjury; and to confirm him Sir Joshua Walmisley was called and examined as to a conversation between himself and the defendant; in his cross-examination Sir Joshua Walmisley spoke in very high terms of the defendant's character. Some entries in the defendant's books were also given in evidence.

Ludlow, Serjt.—I submit that there is not sufficient

founded on the defendant's answer to a bill in equity, *Lee*, C. J., notwithstanding the previous decisions, admitted the testimony of the plaintiff in equity; there, however, it appeared that the equity suit was at an end. But in the case of *Rex v. Boston*, (4 East, 572), where perjury had been assigned on the defendant's answer,

the plaintiff was held to be competent, although the equity suit was still pending; and this on the ground that a Court of Equity would not look at a conviction founded on the testimony of the plaintiff, although it was also founded on other circumstances confirmatory of his testimony." See the case of *King v. Ashburn*, 8 C. & P. 50.

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evidence to go to the jury. The rule is, that a case of perjury cannot be submitted to the jury on the evidence of a single witness; and as to the evidence in confirmation, it is not enough that there should be *some* evidence in confirmation, as in an ordinary case at Nisi Prius, where *some* evidence is necessary to prevent a nonsuit; but it must be such evidence as, in the opinion of the judge, is really confirmatory in some important respect, and equivalent to the positive testimony of a second witness.

COLERIDGE, J.—I think that the case must go to the jury, but I also think without the slightest chance of a verdict for the crown. The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction; and that is so, more especially, where a party has so high a character as has been given to the defendant by Sir Joshua Walmisley.

Whateley.—After that intimation from your Lordship, I shall, on the part of the prosecution, not press the case further.

Verdict—Not guilty.

Whateley, C. Phillips, and J. W. Smith, for the prosecution.

Ludlow, Serjt., F. V. Lee, and Kynnersley, for the defendant.

[Attornies—Hewett, and Ross & Son.]

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REGINA v. MANSFIELD.

In an indictment for receiving stolen tin, "ingots of tin" are properly described as so many pounds weight of tin; so, it would be proper to describe a bar of iron as so many pounds weight of iron; but if an article has obtained, in common parlance, a particular name of its own, it would be wrong to describe it by the name of the material of which it is composed; thus, it would be a misdescription to describe cloth as so many pounds weight of wool, or sovereigns as so many ounces of gold.

A prisoner was to be tried on three indictments: 1st, for receiving stolen tin; 2nd, for stealing iron; 3rd, for receiving stolen brass.

It appeared that a constable went with a search-warrant, to search the prisoner's premises for stolen iron, and that,

having read the warrant to the prisoner, the latter made a statement:—*Held*, on the trial of the first indictment, that the whole of this statement was receivable in evidence, although part of it related to the charge respecting the iron; and also, that evidence might be given, that, at the time of the search, the prisoner endeavoured to conceal some brass; and also, that almost immediately after the prisoner was taken away from the premises, at the conclusion of the search, his wife carried some tin under her cloak, from a warehouse on the premises.

THE prisoner was indicted for receiving "25lbs. weight of tin," knowing the same to have been stolen. The indictment had been removed by certiorari; and came on to be tried at Nisi Prius. There were two other indictments against the same prisoner, the one for stealing iron, and the other for receiving brass, knowing it to have been stolen.

It appeared that the tin in question consisted of two pieces, which a witness called "lumps of tin;" but, on cross-examination, he admitted that they were called in the trade "ingots," but added, that that term was applied as well to the pieces of tin as to the mould in which they were cast, and was applied to the shape. The tin in question had been cast into the pieces for the purpose of being again melted up for use in the prosecutor's manufactory, and in the middle of each was an indentation for the purpose of breaking them in two, when wanted to be melted up again. It was proved by a constable, that on his going to search the premises of the prisoner, under a search warrant for stolen iron, he read the warrant over to the prisoner, and was going to state what the prisoner said, when—

Ludlow, Serjt., for the prisoner, objected that the witness should confine his statement to what was said respecting the tin.

COLERIDGE, J.—Am I not to hear the whole that was said, both the part relating to the iron and also to the tin?

If I am not, it would be garbling the statement, and the jury would not be able to understand it.

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The evidence was given.

It was further proved that the constable, on going into the prisoner's warehouse at the time of the search, saw him with some brass in his hand, which he was endeavouring to conceal in some sand.

Ludlow, Serjt.—I submit that this evidence is not receivable. The reason is, that, upon an indictment for felony, no evidence can be given of any other felony: here evidence is tendered of the receiving the brass. Where one felony is the means of proving another felony to have been committed, evidence may be given of the former, but that is from the necessity of the case.

Greaves, for the prosecution, mentioned the cases of *Rex v. Dunn* (a), and *Rex v. Davis* (b), as showing that other acts of receiving are admissible, even though the subject of other indictments.

COLERIDGE, J.—This is all one transaction, and I think the whole that took place upon the search is admissible. It is like the case of *Rex v. Ellis* (c), where it was held that several stealings of shillings in the course of the same day might be given in evidence; and that was not only held at *Nisi Prius*, but also by the King's Bench.

It was further proved, that, almost immediately after the prisoner had been taken away from the premises, when the search was over, his wife was seen going up to a warehouse on the premises, and afterwards returning across the courtyard with the pieces of tin concealed under her cloak.

Ludlow, Serjt., objected that this evidence ought not to be received, as the possession was the personal posses-

(a) M. C. C. 146.

(b) 6 C. & P. 177.

(c) 6 B. & C. 145.

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sion of the wife, and therefore ought not to affect the husband.

COLERIDGE, J.—It is for the jury to consider, whether her possession was not the husband's possession, she being upon the premises, and all the circumstances being taken into consideration. It is not like the case where the wife is in possession of stolen property at a distance from the premises of the husband.

Upon the close of the case for the prosecution, *Ludlow*, Serjt., for the prisoner, submitted that the tin was misdescribed. Instead of being laid as so many pounds weight of tin, it ought to have been described as two ingots. Wherever an article has obtained a name in the trade which is applicable to it, it must be described by that name. From the case of *Rex v. Stott (d)*, it would seem that it was erroneous to charge the prisoner with stealing so many pounds weight of iron, where it appeared that the articles stolen were actually manufactured. It would be bad to describe a piece of cloth as so many pounds of wool. The object is to enable the prisoner to plead autrefois acquit.

Talfourd, Serjt., and *Greaves*.—*Rex v. Stott* is quite different from the present case; there the goods were actually made up into articles, which had specific names—here the article was still tin, and only put in the shape in which it was, for the purpose of being afterwards manufactured; it is in the course of manufacture not manufactured. Although it would be bad to describe cloth as so many pounds of wool, still an end of a bale of cloth may well be described as so many yards of cloth; so a leg of mutton may be described as so many pounds weight of mutton. As to the objection, that the party could not

plead autrefois acquit: it is the same question; for if the description is sufficient here, it would be sufficient if autre fois acquit were pleaded. It is idem per idem.

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COLERIDGE, J.—It seems to me, that the description is sufficient to answer all the purposes which are required by law. First, it is the subject of larceny equally, whether it be an ingot or so many pounds weight of tin. Secondly, as to the facility of pleading autre fois acquit, the prisoner stands in the same situation, whether it be one or the other, because there must be some parol evidence in all cases to shew what it was that he was tried for before, and it would be as easy to prove one as the other. The last question is, whether it is described with sufficient certainty, in order that the jury may be satisfied that it is the thing described. If this had been some article, that, in ordinary parlance, had been called by a particular name of its own, it would have been a wrong description to have called it by the name of the material of which it was composed, as if a piece of cloth were called so many pounds of wool because it has ceased to be wool, and nobody could understand that you were speaking of cloth. It would be wrong to say so many ounces of gold, if a man stole so many sovereigns; you would there mislead by calling it gold. If it were a rod of iron, it would be sufficient to call it so many pounds weight of iron.

The case went to the jury, who returned a verdict of—

Not guilty (e).

Talfourd, Serjt., and *Greaves*, for the prosecution.

Ludlow, Serjt., and *F. V. Lee*, for the prisoner.

[Attornies—*Kettle*, and *Passman*.]

(e) The prisoner was acquitted on the other two indictments mentioned, *supra*, p. 140.

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Crown Side.

BEFORE MR. JUSTICE COLTMAN.

REGINA v. WARDLE.

A prisoner was indicted for killing a cow, and in another indictment for killing a calf. He had pleaded to both indictments, and the jury were charged with the first. By a mistake, the evidence applicable to the second indictment was given, instead of that which was applicable to the first. The mistake was discovered while the prisoner's counsel was addressing the jury:—*Held*, that the evidence properly applicable to the first indictment should then be given.

KILLING cattle.—The prisoner was indicted for maliciously killing a cow. The prisoner had been arraigned on this indictment, and the jury were charged with it. There were five other indictments against the prisoner for killing a calf and other cattle.

F. V. Lee, for the prosecution, opened by mistake, the case of killing the calf, which was the subject of one of the other indictments, to which the prisoner had pleaded, but with which the jury were not charged.

Evidence was given of the killing of the calf, but no evidence as to the killing of the cow.

W. Johnstone Neale, for the prisoner, was addressing the jury on the evidence as to the killing of the calf. Before the case had proceeded further, Mr. Bellamy, the clerk of assize, observed that the evidence which had been given did not apply to the case in which the jury were charged, but to one of the others.

F. V. Lee now wished to give evidence as to the killing of the cow, inasmuch as through inadvertence no evidence had been adduced on that charge, which was really the subject of the trial.

W. Johnstone Neale.—I submit that this cannot be done. The case for the prosecution is closed, and there is no

evidence to affect the prisoner on the charge on which he is now tried.

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COLTMAN, J., (having conferred with *Coleridge*, J.)—We are of opinion, that the witnesses should now be called, who can give evidence as to the killing of the cow, which is the subject of the indictment with which the jury are now charged.

The evidence was given.

The prisoner was acquitted on the merits.

F. V. Lee, for the prosecution.

W. Johnstone Neale, for the prisoner.

[Attornies—*Bowen* and *Whalley*.]

REGINA v. SOPHIA WILSHAW.

LARCENY.—The prisoner was indicted for stealing money, the property of Joseph Wood, her master.

It was opened by *Talbot*, for the prosecution, that the prosecutor was bed-ridden, and he proposed to give in evidence the deposition of the prosecutor, taken before Mr. Powis, the committing magistrate, in the presence of the prisoner.

To prove the prosecutor's state of health, Mr. Bowen was called: he said, "I am a surgeon; I know Mr. Joseph Wood; he is 85; he is quite infirm and bed-ridden; he can sit on the side of his bed when he is lifted out; he is not

On the trial of a case of felony, where the prosecutor is bed-ridden, and not likely to be ever able to attend the assizes, his deposition, taken by the committing magistrate in the presence of the prisoner, may be given in evidence; and the deposition may be proved by a person who was present, without

calling the magistrate or his clerk. When a deposition, taken before a magistrate, is to be given in evidence, it is very proper, as matter of caution, that the magistrate or his clerk should be called, in all cases where it can be conveniently done; but it is not necessary in point of law.

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able to bear a journey to the assizes, and I think it is not likely that he ever will be so."

To prove the deposition of the prosecutor a constable was called. He said, "I went with Mr. Powis, the magistrate, to the house of Mr. Joseph Wood; what he said was taken down by Mr. Powis in the presence of the prisoner; this paper is all in Mr. Powis's hand-writing, except the cross at the bottom of it, which is Mr. Wood's; I saw him make it; the deposition was read over to Mr. Wood, and he was sworn to the truth of it."

E. Yardley, for the prisoner.—I submit that, as Mr. Wood is a marksman, the deposition ought not to be read without calling either the magistrate or his clerk.

COLTMAN, J.—It is very proper, as matter of caution, that the magistrate or his clerk should be called in all cases where it can be conveniently done; but I think it is not necessary in point of law (a).

The deposition was read.

The prisoner was acquitted on the merits.

Talbot, for the prosecution.

E. Yardley, for the prisoner.

[Attornies—*Keen*, and *Whalley*.]

(a) See the case of *Reg. v. Hearn*, ante, p. 109.

1841.

BEFORE MR. SERJEANT LUDLOW.

REGINA v. MARSHALL and Others.

NIGHT POACHING.—The first count of the indictment charged the defendants with night poaching, on the 3rd of August, 4 Vict., in land in the parish of Longden. The second count of the indictment was for assaulting William Rickards, a servant of the Marquis of Anglesey, the lord of the manor, and the third count for a common assault.

It was opened by *Tyrwhitt*, for the prosecution, that William Rickards was suffering from a blow on the head which had affected his intellects, and that he had also been subject to delirium and lowness of spirits; but that Dr. Knight, the physician who attended him, thought it probable that he might recover in a few weeks. He cited the cases of *Rex v. Eriswell* (a), and *Regina v. Wilshaw* (b), and proposed to give in evidence the deposition of Rickards, taken before the committing magistrate in the presence of the defendants.

Dr. Knight was called—He said, “I am a physician; William Rickards has been under my care; he has been suffering from delirium and depression of spirits, in consequence of a blow on the head; his intellects are affected by the injury; I think he will recover, but I cannot say how long it may be before he will be well.”

(a) 3 T. R. 707. In that case, Lord *Kenyon* says, “I admit that this man, who is proved to be insane, is to be considered as to this purpose [the receiving of his deposition in evidence] in the same

state as if he were dead; and it has been decided, that in such cases, the party's hand-writing may be proved, as if he were actually dead.”

(b) Ante, p. 145.

If a witness is actually insane at the time of the trial of an indictment for a misdemeanor, his deposition, taken before the committing magistrate, is receivable in evidence, the same as if the witness were dead, although the insanity of the witness may be only temporary; but if it appear that the witness be not insane, but that the witness has been suffering from delirium and depression of spirits, in consequence of a blow on the head, and that his intellects are affected by the injuries he has received, but it be the opinion of his physician that he will recover, the deposition of the witness, taken before the committing magistrate, is not receivable in evidence.

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MARSHALL.

LUDLOW, Serjt., (having conferred with COLTMAN, J.)—
Mr. Justice *Coltman* is of opinion, that if the witness is actually insane at this time, his deposition is receivable in evidence, although the insanity of the witness may be only temporary.

Dr. Knight, in answer to a question of the learned Serjeant, said, "I cannot say that Rickards is now in a state of insanity."

LUDLOW, Serjt.—The deposition cannot be received in evidence.

The evidence was rejected, but on the evidence of two other witnesses, who were with Rickards on the night in question, the jury found all the defendants guilty.

Tyrowhitt, for the prosecution.

F. V. Lee, for the defendants.

[Attornies—*Landor & Gardener*, and *Passman*.]

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SHROPSHIRE ASSIZES.

Crown Side.

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. BOWEN.

WOUNDING.—The indictment charged the prisoner with having maliciously wounded John Bailey, with intent to disable and disfigure him, and with intent to do him some grievous bodily harm.

It appeared from the statement of the prosecutor, that he was returning home from Colebrookdale to Wellington, on the night of the 3rd of May, 1841, when he was asked by a man which was the way to Wellington; and that, on his turning round to shew the man the way, he saw another man, but, before he could at all ascertain who the parties were, he received a blow, and was severely wounded, and was immediately robbed of money and goods. It was proved by a police officer, who took the prisoner into custody, that he told the prisoner that he took him for a highway robbery, upon which the prisoner said, "that it was a hard case that he should suffer, as the other man did it, and he ran away." There was other evidence shewing that two persons were present, but no evidence to shew which of them it was who struck the prosecutor. Part of the stolen property was found in the possession of the prisoner.

On an indictment for wounding, with intent to do grievous bodily harm, it appeared that two persons, one of whom was the prisoner, attacked and wounded the prosecutor, and robbed him; it was not proved which of the two persons inflicted the wound:—*Held*, that if the prisoner inflicted the wound on the prosecutor with intent to rob him, he having at the same time an intent to do him grievous bodily harm to effectuate such his intention of robbing, he ought to be indicted on this indictment.

Held, also, that even if

the prisoner's was not the hand that inflicted the wound, he ought to be convicted on this indictment, if the jury are satisfied that the two persons were engaged in the common purpose of robbing the prosecutor, and that the other person's was the hand which inflicted the wound.

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F. V. Lee, for the prisoner.—I submit that the statute 9 Geo. 4, c. 31, s. 12, was intended to apply to those cases only where the ultimate intent of the party was to do some grievous bodily harm, the words of the statute are, "shall unlawfully and maliciously wound any person, with intent to do some grievous bodily harm to such person." The whole of the circumstances of the case are therefore to be taken into the consideration of the jury, for them to ascertain the intent. Here the wounding was not the object or ultimate intent of the parties, it was rather the means tending to an end—the intent being to rob and not to do bodily harm, the means of effecting the intent to rob being the wounding of the party to be robbed. It is said, that a man intends the result of his own act, and trying the present case by that test it would appear that the result of the act of wounding was the robbery which was effected by means of it. Secondly, there is no evidence that the prisoner inflicted the wound.

COLERIDGE, J., (in summing up).—Mr. *Lee* has put it, that it is doubtful whether this case is within the statute 9 Geo. 4, c. 31, s. 10. There have been two cases something like the present, but neither of them expressly in point (a). If you believe that the prisoner inflicted this wound on

(a) The cases of *Rex v. Duffin*, R. & R. C. C. 365; and *Rex v. Gillow*, M. C. C. 85. In the case of *Rex v. Duffin*, the prisoners were indicted for cutting James Sharp, with intent to murder him, with intent to disable him, and with intent to do him some grievous bodily harm. The jury "found that the acts done by the prisoners were done with intent to obstruct, resist, and prevent their apprehension, and for no other purpose;" and the Judges held, that, as the intents laid in the indictment had been all negatived by the jury, the

conviction could not be supported. In the case of *Rex v. Gillow*, the prisoner was indicted for shooting at Dennis Carter, with intent to do him some grievous bodily harm. The jury were of opinion, "that the prisoner's motive was to prevent his lawful apprehension, but that, in order to effect that purpose, he had also the intention of doing Carter some grievous bodily harm." The Judges held, "that, if both the intents existed, it was immaterial which was the principal and which the subordinate one, and that the conviction was therefore proper."

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the prosecutor with an intent to rob him, but had at the same time, an intent to do him some grievous bodily harm in order to effectuate such his intention of robbing, then I am of opinion, in point of law, that the prisoner ought to be convicted on this indictment, although his ultimate object may have been to rob the prosecutor. It has also been contended, that there is no evidence to shew that the prisoner inflicted the wound; but I am of opinion, that, if the prisoner did not with his own hand inflict the wound, he may be convicted upon this indictment, if you are satisfied that the prisoner and the other person were engaged in a common purpose of robbing the prosecutor, and that the other person's was the hand that inflicted the wound (a).

Verdict—Guilty; the foreman of the jury adding, that they were satisfied that the prisoner intended to do the prosecutor some grievous bodily harm.

W. Johnstone Neale, for the prosecution.

F. V. Lee, for the prisoner.

[Attornies—*Knock*, and *Bythell*.]

(a) See the case of *Rex v. Howell*, 9 C. & P. 437, and the authorities there referred to.

REGINA v. BOTFIELD, Esq.

NUISANCE.—The indictment was in the following form:—"The jurors for our Lady the Queen upon their oath present, that T. B., late of the parish of Nunsavage, in the county of Salop, Esquire, on the 24th of December, 3 Vict., at the parish aforesaid, in the county aforesaid, in, In an indictment for a nuisance, in obstructing a highway "leading from the township of D. unto the town of C.," by placing a gate across it, the termini D. and C. are excluded; and therefore, if it appear that the gate was put up in the township of D., the defendant must be acquitted.

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upon, and across a certain road there, commonly called Titford Road, being the Queen's public common and ancient highway, leading *from* the township of Detton, in the county aforesaid, unto and across a certain brook and a certain ford respectively, there and thence *unto* the town of Cleobury Mortimer, also in the said county, and, from time immemorial, used by and for all the liege subjects of our said Lady the Queen and her predecessors, with their horses, carts, and carriages, to go, return, pass, and repass thereon and thereover, at their own free will and pleasure, unlawfully and injuriously did erect and set up, and cause and procure to be erected and set up, a certain wicket and gate, and did then and there unlawfully and injuriously permit and suffer the said wicket and gate so erected and set up as aforesaid to be and remain, and the same was in, upon, and across the common highway aforesaid for a long space of time, to wit, from the day and year aforesaid continually until and upon the day of the taking of this inquisition, whereby the common highway aforesaid then and for and during all the time aforesaid was and still is greatly obstructed and straitened, insomuch that the liege subjects of our said lady the Queen could not then, nor can they now, go, return, pass, and repass with their horses, carts, and carriages, in, through, over, and along the common highway aforesaid, as they had been wont and accustomed to do, and of right they ought to have done, and still of right ought to do, to the great damage and common nuisance of all her Majesty's liege subjects going, returning, passing, and repassing with their horses, carts, and carriages, in, through, over, and along the common highway aforesaid, to the evil example, &c., and against the peace, &c."

There was a second count, which was similar to the first, except that it described the road as "a certain other road there, called Titford Road, being the Queen's public common and ancient highway, leading *from* the township of Detton aforesaid, in the county aforesaid, *unto* the brook

and ford aforesaid, and, from time immemorial, used, &c.," (as in the first count).

Upon the cross-examination of the first witness for the prosecution, it appeared that the gate in question was erected across that part of the highway which was situate in the township of Detton.

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Ludlow, Serjt., and *F. V. Lee*, for the defendant.—Upon this evidence, the defendant must be acquitted. The word "*from*" excludes Detton; and the word "*unto*" excludes Cleobury Mortimer; and as the nuisance is proved to be *in* Detton, and not between Detton and Cleobury Mortimer, the charge in the indictment is not proved. They cited the cases of *Rex v. Inhabitants of Gamlingay* (a), and *Rex v. Inhabitants of Upton on Severn* (b).

Godson and *Busby*, for the prosecution.—The cases cited were indictments for non-repair of highways, where greater particularity is required. It is there essential to shew exactly what part of the road is out of repair; and in those cases, the judgment is often very material as evidence to shew in other cases to what extent the party was held liable to repair the road. The present case is one of a nuisance in obstructing a highway, which does not require so great particularity. The words "leading from the township of Detton," &c., might be rejected as surplusage, and then the indictment would state it to be a certain road, commonly called Titford Road, in the county of Salop, which would be quite a sufficient description.

COLERIDGE, J.—I am always sorry when cases of this kind are disposed of on technical grounds; but although, at the first blush, it appears both hard and unwise in the particular instance so to dispose of the rights of parties, yet it is of very much importance to the public that legal

(a) 3 T. R. 513.

case of *Reg. v. Fisher*, 8 C. & P.

(b) 6 C. & P. 133. See also the 612.

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principles should be maintained. It may sometimes happen, that, in carrying out those principles, they may appear to press hard in certain individual cases; but by a contrary course, the law would be frittered away by endless distinctions, and, at last, we should hardly know what the law was, and that state of things would be more injurious to the public than a strict adherence to general principles. If I were to allow these words to be rejected as surplusage in this case, I should encourage a loose and negligent style of pleading; and I know not how soon the same doctrine might be applied to cases affecting even the lives of our fellow creatures, who might then be indicted for one thing, and found guilty of another. It has been ingeniously urged, that this case is distinguishable from those cited, as they were indictments for the non-repair of roads. The distinction is, however, more ingenious than sound, as an indictment for the non-repair of a road is an indictment for a nuisance to the public, by means of the parties not doing their duty by repairing the road (*c*); and the present is an indictment for nuisance to the public, by obstructing the road. As there are direct authorities to shew that in an indictment for a nuisance by not repairing a road, the words "from" and "to" exclude the termini, I am of opinion, that the objection must prevail, and the defendant must be acquitted.

Verdict—Not guilty.

Godson and *Busby*, for the prosecution.

Ludlow, Serjt., and *F. V. Lee*, for the defendant.

[Attornies—*Vickers*, and *Peele*.]

(*c*) Indictments for the non-repair of highways, always conclude to the "common nuisance" of her Majesty's subjects, going, returning, passing, &c., along the highway; and it seems to be worthy

of consideration, whether they would not be bad if that conclusion were omitted. See 1 Curw. Hawk. B. 1, ch. 32, pp. 692 et seq.; and *Rex v. Hughes*, 4 C. & P. 373.

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HEREFORD ASSIZES.

BEFORE MR. JUSTICE COLERIDGE.

(*Civil Side*).

DOE on the Demise of BODENHAM v. COLCOMBE, Esq.

EJECTMENT to recover a cottage, a garden, and two pieces of land, situate in the township of Lower Bullingham, in the parish of St. Martin, in the county of Hereford.

The lessor of the plaintiff claimed the premises as the landlord of the defendant, to whom notice to quit had been given.

To prove the tenancy of the defendant, it was proposed to give in evidence a series of rent rolls, from which it appeared that rent had been paid by the defendant to Mr. Rosser, a deceased steward of the lessor of the plaintiff. Each of these rent rolls was made out in four columns; and it was proved, that the first and second columns, containing the tenants' names and amounts to be paid, were filled up by the lessor of the plaintiff, and that the third and fourth columns, which contained the amount of rent actually received from each tenant, and the date when it was received, were filled up in the hand-writing of the late Mr. Rosser; but neither of the rent-rolls was signed by him.

The rent-rolls of an estate were unsigned, and were drawn out in four columns. The first and second columns, containing the tenants' names, and the amount to be paid by each, were in the hand-writing of the owner of the estate. The third and fourth columns, containing the amount actually received of each tenant, and the date when received, were in the hand-writing of a deceased steward:—*Held*, that these rent-rolls were receivable in evidence, as accounts of a deceased steward charging himself.

F. V. Lee, for the defendant, submitted, that these rent-rolls were not receivable in evidence, as they were neither wholly in the hand-writing of the deceased steward, nor signed by him.

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 }
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COLERIDGE, J.—The question is, whether these entries would be sufficient to enable the lessor of the plaintiff to charge the steward with the receipt of these sums. Now here the steward, by putting down the sum against the defendant's name in the column for sums received, not only charges himself with the receipt of this amount, but he also puts in the next column a statement of the time when he received it. If Mr. Bodenham had been obliged to bring an action against Mr. Rosser to recover this amount from him, what better evidence could he have than these rent-rolls.

The evidence was received (*a*).

Verdict for the plaintiff.

Ludlow, Serjt., and *W. J. Alexander*, for the plaintiff.

F. V. Lee, for the defendant.

[Attornies—*Anderson & Blount*, and *Collins*.]

(*a*) See the cases of *Doe d. Sturt v. Mobbs*, ante, p. 1, and *Brune, Esq. v. Thompson*, ante, p. 34.

1841.

REGINA v. The Inhabitants of the Parish of PEMBRIDGE.

INDICTMENT for the non-repair of highways.—The indictment contained eight counts, charging the inhabitants of the parish of Pembridge with the non-repair of certain roads within the said parish.—Plea to the first count, that the said parish is, and, from time whereof the memory of man is not to the contrary, hitherto hath been divided into six townships; and that so much of the said highway in the first count mentioned as extends from &c., 1144 yards, is, and from time whereof &c., hath been situate within the township of Weston, and that the residue is, and during all the time aforesaid hath been, situate in the township of Broxwood; and that the inhabitants of the township of Weston, from time whereof &c., have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and so often as it hath been or shall be necessary, independently of the inhabitants of the rest of the said parish, so much and such part of the said highway in the said first count mentioned as is situate within the said township of W.; and that the inhabitants of the said township of B., from time whereof &c., [in the same manner as to the part in B., as above as to the part in W.]; and by reason &c. the inhabitants of W. ought to repair the part in W., and the inhabitants of B. the part in B., independently of the rest of the inhabitants of the said parish. There were other pleas to the other counts

On the trial of an indictment for the non-repair of highways, entries in an ancient parish-book, produced by the churchwarden from the parish chest, were offered in evidence, to shew who were the surveyors of the highways in 1707:—*Held*, that the evidence was receivable.

A minute-book, kept by the magistrates' clerk, was offered in evidence, to shew who had been appointed by the magistrates to be surveyors of the highways for the year 1812:—*Held*, that this evidence was not receivable without proof of a search for the original appointment, under the hands and seals of the magistrates.

Whether the minute-book would have been receivable as secondary

evidence, if the original appointments had been lost—*Quære*.

A written resolution of a vestry meeting purported to allow to Mr. D. £50:—*Held*, that evidence was not admissible, to prove what was said by the persons who were at the meeting, with a view of shewing what the £50 were allowed for.

A witness, who produced an examined copy of a record of a conviction at the assizes, stated that he examined it with the original record, in the custody of the clerk of assize, but that he thought the original record was written on paper, but was not sure. It was proved, by the son of the clerk of assize, that all the records in his father's custody were written on parchment, but he had no recollection of this particular record:—*Held*, that the examined copy was receivable in evidence.

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in a similar form, *mutatis mutandis*, to adapt them to the other roads mentioned in those counts (a).

Replication to the first plea, that the inhabitants of the said township of W., from time whereof &c., have not repaired and amended &c., (traversing the custom in the terms of the plea).

There were similar replications to the other pleas.

At the trial, the defendants began, and they proposed to read from an old book, which was produced by a churchwarden from the parish chest, entries, in which the names of the surveyors of the highways were stated, beginning with the year 1707.

Talfourd, Serjt.—These entries, although good evidence against the defendants, are not admissible for them.

COLERIDGE, J.—I think they are admissible. Could any other evidence be given of who were the surveyors at that time?

The evidence was received.

A clerk to the justices in petty sessions produced a book purporting to contain entries of the appointments of surveyors for Pembridge, which he had received from a former clerk, who was dead. He stated, that he had been clerk for seven years, and that, during that time, it had been the invariable practice to appoint the surveyors without any warrant under the hand and seal of the magistrates, and that the only written matter was the entry

(a) The defendants had previously pleaded, that the parish was divided into six townships, and that each of the six townships from time immemorial had repaired all the roads situate within it, independently of the rest of the parish. They afterwards obtained leave to

plead the pleas above mentioned; and Mr. Justice *Patteson* having taken time to consider whether they should have such leave, granted it, at the same time stating that there was no precedent for such pleas; and he very much doubted whether they would be good even after verdict.

made by the clerk in the book produced. The entry proposed to be read was of the year 1812.

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Talfourd, Serjt., *Greaves*, and *Smythies*, for the prosecution.—These entries are inadmissible; they are neither primary nor secondary evidence. The best evidence is the appointment itself, and that, by 13 Geo. 3, c. 78, s. 1, must have been under the hands and seals of the magistrates. They are only authorized to appoint in that manner; and it is to be presumed, that they did their duty. If the evidence of the witness goes for any thing, it goes to prove that no legal appointments were ever made. The only cases in which entries by officers are admitted, are, where there is a public officer, and he has a public duty to perform, and the entries were made in performance of that duty. Here the clerk is no officer; he is the mere servant of the justices, and holds his situation by so infirm a tenure, that a mandamus will not lie to restore him to his situation (*b*): he may be dismissed instant; neither is there any duty to perform. There is nothing that requires the clerk to the justices to make any such entry; they are merely the voluntary entries of a person who has no authority to make them, and no duty to perform in making them. Suppose an indictment were preferred against a party for refusing to execute the office of surveyor, it is impossible to contend that these entries would be evidence to prove his appointment. Neither are they admissible as secondary evidence; for no search has been made, or loss proved, of the original appointments; and even if that had been done, these entries would not be secondary evidence, as they are the mere unwarranted entries of the party making them.

W. J. Alexander, *F. V. Lee*, and *Domville*, for the defendants.—This is not secondary evidence, it is the best evidence. We do not require the same strictness of

(*b*) See the case of *Ex parte Sandys*, 4 B. & Ad. 863.

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proof here as in an indictment against a person for refusing an office. These are the records of a Court, and of the proceedings that have taken place at that Court. The case of *Rex v. Martin* (c) goes to shew that this evidence is admissible.

COLERIDGE, J.—There the act required that notice should be given, and that the surveyor should be elected at a vestry; and the entry was, that A. was elected. That was all in direct compliance with the act; but here you are seeking to shew an appointment by this sort of evidence in direct contravention of the act. You are obliged to assume, upon evidence as to a few years' practice, that the justices have acted directly against the provisions of an act of Parliament.

W. J. Alexander.—It is not necessary that the appointment should be strictly regular.

COLERIDGE, J.—Perhaps not; but this is merely a parol appointment?

W. J. Alexander.—The entry is the only evidence of the appointment. There is no other; it is the only appointment.

F. V. Lee.—The question is, whether it is compulsory under the act to appoint by warrant?

COLERIDGE, J.—Do you mean to say that the magistrates may appoint otherwise than by warrant?

(c) 2 Camp. 100. In that case, it appeared that by a private act of Parliament, for regulating the concerns of the poor of the parish of Greenwich, it was required, that certain notice should be given of a vestry for the election of a treasurer, and that a treasurer should be elected at a vestry held in pursuance of such notice. Held, by Lord Chief

Baron *Macdonald*, that an averment in an indictment for a libel, "that R. B. was duly elected treasurer of the said parish," was sufficiently proved by an entry in the vestry book, which stated, that R. B. was elected treasurer at a vestry "duly held in pursuance of notice."

F. V. Lee.—The acceptance of the appointment is the thing that makes a man an officer.

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COLERIDGE, J.—The appointment by the magistrate is an absolute appointment. If the persons appointed refuse the office, they are liable to a penalty (*d*); therefore, it cannot be said to be voluntary: the appointment of a sheriff is absolute, although he may avoid serving by paying a fine.

Talfourd, Serjt., in reply, was stopped by the learned Judge.

COLERIDGE, J.—I cannot receive this evidence. It could only be receivable as primary or secondary evidence. I should be bound to presume, that the justices had proceeded according to law; and then the only course to make these books evidence, would be to show, first, that search had been made, and that the warrants had not been found, and then to show that the practice had been to make these entries; but that has not been done. Then it is put, that the entries may be received as primary evidence; that is, that they are the act of appointment. Now there is an act of Parliament, which requires an appointment to be made under hand and seal, and the magistrates seem to have chosen not to act accordingly. The whole proceeding has been irregular, and the justices have proceeded in a totally wrong way. The justices, by these entries, no more made these persons legal surveyors, than if I had myself made the appointment.

The evidence was rejected (*e*).

The resolution of a vestry meeting held the 12th April, 1821, was read; and it purported to allow Mr. Davies a sum of £50.

(*d*) Formerly, under the stat. 13 Geo. 3, c. 78, s. 1; but now under the stat. 5 & 6 Will. 4, c. 50, s. 8.

a witness produced several appointments of the surveyors under the hands and seals of the magistrates.

(*e*) In a later stage of the cause,

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W. J. Alexander proposed to ask what was said by persons present at the meeting.

Talfourd, Serjt., objected.

COLERIDGE J.—Here is a vestry meeting, which comes to a resolution to allow Mr. Davies £50; whatever a person says, when he enters into a written agreement, might be given in evidence, if parol evidence may here be given, in addition to this written resolution.

W. J. Alexander.—What is said is explanatory of the resolution.

COLERIDGE, J.—I am very clearly of opinion, it is not evidence. If the meeting meant to guard the resolution by any thing in addition to the terms of it, they should have entered it as part of the resolution (*f*).

For the prosecution, in order to prove the conviction of the parish upon an indictment for non-repair of these roads, in 1806, a witness was called, who stated that he went to the house of Mr. Bellamy, the clerk of assize of the Oxford Circuit, in London, and there saw him and Mr. Charles Bellamy; that he there asked for the record, and received a written paper, (which he produced), which he and Mr. C. Bellamy compared with a document, also then produced as the record, and which the witness stated, he thought was paper, but he was not sure whether it was paper or parchment; but it was much torn.

Mr. C. Bellamy was called as a witness, but he could not recollect the particular transaction. He stated that the practice was, when a record was required, to make it out from the minutes and the indictment, on an original parchment roll, which was signed by Mr. Bellamy; and

(*f*) See the stat. 58 Geo. 3, c. 69, s. 2.

that a copy was then made on paper, and compared with the roll, and stamped with the Oxford Circuit Stamp, which was given to the party applying for it; and that, as far as his own experience for four or five years went, the roll was drawn up from the indictment and minutes, without any paper draft in the first instance being made; and that he never knew of a paper copy having been kept. Mr. C. Bellamy also stated, that the paper now produced was signed by Mr. Bellamy, and stamped with the Circuit Stamp.

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W. J. Alexander objected, that there was no evidence of a record on parchment, which was essential. He cited the case of *Rex v. Smith (g)*.

COLERIDGE, J.—An objection of this kind ought to be made out on the facts. I am by no means satisfied that the original document was not on parchment (*h*). Mr. Charles Bellamy speaks of the practice, and states, that there is always a parchment record drawn up; and all that can be said is, that the witness is not certain whether this record was upon paper or not. He says, I applied for a record, and it was produced as a record; but I cant say whether it was on paper or on parchment. I think the evidence admissible.

The evidence was received.

Verdict for the Crown.

(*g*) 8 B. & C. 341, and Carr. Supp. p. 189. See also the case of *Porter, Esq. v. Cooper, Esq.*, 6 C. & P. 354. Lord Chief Baron Comyns says, (Com. Dig. tit. Record A., citing Co. Litt. 117. b. and 260. a.): "A record is a memorial of a proceeding or act of a Court of record, entered in a roll of parchment, for the preservation of it."

(*h*) There is every reason to suppose that the suggestion, that this record was written on paper, was

founded entirely in mistake. We believe that *all* the records of the Oxford Circuit are and always have been written on parchment. And when even recognizances have been sent by magistrates to the clerk of assize written on paper, (as they sometimes have been), it has been the uniform practice for the clerk of assize to send them back, that they might be re-written on parchment.

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[Attornies—*B. Bodenham, and Banks.*]

(*Crown Side.*)

BEFORE MR. JUSTICE COLTMAN.

REGINA v. ANN WALTERS.

If a person do any act towards another who is helpless, which must necessarily lead to the death of that other, the crime amounts to murder; but if the circumstances are such that the person would not have been aware that the result would be death, that would reduce the crime to manslaughter, provided that the death was occasioned by an unlawful act, but not such an act as shewed a malicious mind.

If a woman left her child, a young infant, at a gentleman's

door, or other place where it was likely to be found and taken care of, and the child died, it would be manslaughter only; but if the child were left in a remote place, where it was not likely to be found—*e. g.* on a barren heath—and the death of the child ensued, it would be murder.

MURDER.—The first count of the indictment charged that the prisoner, on the 13th of April, 1841, at Ledbury, being big with a female child, the said female child alone and secretly did bring forth alive; and that she, in and upon the said female child being so alive, and not named, feloniously, wilfully, and of her malice aforethought, did make an assault; and that she, in a certain Queen's highway and open place, there feloniously, wilfully, and of her malice aforethought, did wilfully leave, abandon, and expose the said child, naked and without protection, to the cold and inclemency of the weather; and that she, on &c., at &c., after the child was born, feloniously &c., did neglect, omit, and refuse to tie, fasten, and secure the navel-string of the body of the said child, and to administer to the said child such food as was sufficient and necessary for the support and maintenance of the child. By means of which exposure, and also of omitting to tie the navel-string, and to give sufficient food, the child died. The second count was similar

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to the first count, but omitted that part of it which related to the omission to tie the navel-string. The third count stated it to be the duty of the prisoner, as the mother of the child, to provide proper clothes and protection for it, the child being unable to provide for itself; and that she exposed it to the inclemency of the weather, by which it died (a). The fourth count stated a duty in the prisoner

(a) As the forms of this and the following counts of the indictment may be useful in practice, we have subjoined them.

Third count.—"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Ann Walters afterwards, to wit, on the same day, and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon a certain female child, then and there born of the body of the said Ann Walters, whose name is to the jurors aforesaid unknown, feloniously, wilfully and of her malice aforethought, did make an assault. And the jurors aforesaid, upon their oath aforesaid, do further present, that it was the duty of the said Ann Walters, then and there, to provide proper and sufficient clothes, covering, and protection, for the body of the said last-mentioned female child, the said last-mentioned female child being then and there unable to provide for and take care of herself; and that the said Ann Walters then and there, contrary to her duty in that behalf, feloniously, wilfully, and of her malice aforethought, with both her hands did put and place the said last-mentioned female child in a certain common and public highway and open place there, and then

and there did feloniously, wilfully, and of her malice aforethought, desert and leave the said last-mentioned female child there exposed to the inclemency of the weather, without sufficient clothes, covering, shelter, and protection for the body of the said last-mentioned female child. By means of which said several premises in this count mentioned, the said last-mentioned female child became and was mortally sick, weak, and disordered in her body; of which said mortal sickness, weakness, and disorder aforesaid, the said last-mentioned female child, on and from the said 13th day of April, in the year aforesaid, until the 14th day of the same month, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, and then and there, to wit, on the said 14th day of April, in the year aforesaid, at the parish aforesaid, in the county aforesaid, did die. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Ann Walters, the said last-mentioned female child, in manner and form last aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our lady the Queen, her crown and dignity."

Fourth count.—"And the jurors aforesaid, upon their oath aforesaid,

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to secure the navel-string of the child, to procure clothing and shelter for it, and to give it milk and food; and that

do further present, that the said Ann Walters afterwards, to wit, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, being big with a certain female child, the same female child alone and secretly from her body did then and there bring forth alive. And the jurors aforesaid, upon their oath aforesaid, do further present, that it then and there became and was the duty of the said Ann Walters, as the mother of the same child, [to fasten, tie, and secure the navel-string of the body of the same child, and to provide and procure such clothing, covering, and shelter for the body of the same child, as were then and there necessary and sufficient to protect and defend the same child from the cold and inclemency of the weather, and also to procure for, and give, and administer to the same child such milk and food as was then and there necessary and sufficient for the support and maintenance of the said child]. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Ann Walters, not regarding her duty in that behalf, but being moved and seduced by the instigation of the devil, on the day and year first aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the same child not named, in the peace of God and our said lady the Queen then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said Ann Walters, the same child into both her hands, feloniously,

wilfully, and of her malice aforethought, did then and there take, and that the said Ann Walters, the same child, feloniously, wilfully, and of her malice aforethought, with both her hands, did then and there put and place, in a certain road there situate, and the same child in the said road, then and there, feloniously, wilfully, and of her malice aforethought, did expose, leave, and abandon, naked and without any clothing, covering, or shelter whatever to protect the body of the same child from the cold and inclemency of the weather. † And that the said Ann Walters did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to tie, fasten, or in any way secure, the navel-string of the body of the same child; and that the said Ann Walters did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to provide and procure any clothing, covering, or shelter whatsoever for the same child; and that the said Ann Walters did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to procure for, or to give or administer to the same child any milk or other food whatsoever, by means of which said last-mentioned exposure, leaving, and abandonment of the same child, and also by the omitting and refusing to tie, fasten, and secure the navel-string of the same child as aforesaid, and to provide and procure clothing, covering, and shelter for the body-

she exposed the child to the inclemency of the weather, did not provide it with clothing and shelter, and omitted to supply it with food, by means whereof the child died. The

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of the same child as last aforesaid, and to procure for, and give, and administer to the same child milk and food as last aforesaid,† the same child, from the time of its birth aforesaid, on the day and year first aforesaid, until the 14th day of the same month, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 14th day of April, in the year aforesaid, the same child, at the parish aforesaid, in the county aforesaid, of such leaving, abandonment, and exposure, and of such wilful omission, neglect, and refusal as in this count mentioned, did then and there die. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Ann Walters, the same child in manner and form last aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder, against the peace of our lady the Queen, her crown and dignity."

Fifth Count.—Exactly similar to the 4th, but, instead of the part between [], inserting the following:—"to protect and defend the same child from the cold and inclemency of the weather, and to provide and procure such clothing, covering, and shelter for the body of the said child as was then and there necessary and sufficient to protect and defend the same child from the cold and inclemency of the weather."* And instead of the allegation between † †, inserting the following:—"And that the said

Ann Walters did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to protect and defend the same child from the cold and inclemency of the weather, or to provide or procure any clothing, covering, or shelter whatsoever for the same child, ** by means of which said last-mentioned exposure, leaving, and abandonment of the same child, and also neglecting, omitting, and refusing to protect and defend the same child from the cold and inclemency of the weather, and to provide and procure clothing, covering, and shelter for the body of the same child, as in this count mentioned."***

Sixth Count.—Exactly similar to the 5th count, except that, in stating the duty of the prisoner, the following words were added at the *:—"And also to procure for, and give, and administer to the same child such milk and food as was then and there necessary and sufficient for the support and maintenance of the same child;" and in stating the cause of the death the following allegation was inserted at the **:—"And that the said Ann Walters did then and there feloniously, wilfully, and of her malice aforethought, wholly neglect, omit, and refuse to procure for, give, or administer to the same child any milk or other food whatsoever." And at the *** the following was inserted:—"And to procure for, and to give and administer to the same child, milk and food as last aforesaid."

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fth count was similar to the fourth, except that it confined the allegation of the duty, and the breach of it, to the clothing and shelter. The sixth count was also similar to the fourth, except that it confined the allegation of the duty, and the breach of it, to the clothing and shelter, and the administering of milk and food.

Greaves, for the prosecution, in his opening cited the following passage from Sir William Russell's work on Crimes and Misdemeanours (*b*): "If a man, however, does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no stroke be struck by himself, and no killing may have been primarily intended (*c*): as where a person carried his sick father, against his will, in a severe season, from one town to another, by reason whereof he died (*d*); or where a harlot, being delivered of a child, left it in an orchard covered only with leaves, in which condition it was killed by a kite (*e*); or where a child was placed in a hogstye, where it was devoured (*f*). In these cases, and also where a child was shifted by parish officers from parish to parish, till it died for want of care and sustenance (*g*), it was considered that the acts so done, wilfully and deliberately, were of malice prepense."

It appeared that the prisoner, who was an unmarried woman, had taken a place, to go by a stage-waggon, on the 13th of April, 1841, and that she started by the waggon, from Worcester, on the evening of that day, and was in the waggon at about ten o'clock on that night, at the Wellington Inn, which is situated on the Malvern hills; and that she must have left the waggon after that time, as she overtook the waggon at Ledbury. It further appeared,

(*b*) Book 3, ch. i.

c. 31, s. 6.

(*c*) 4 Blac. Com. 197.

(*f*) 1 East, P. C. c. 5, s. 13, p.

(*d*) 1 Hawk. P. C. c. 31, s. 5; 1

226.

Hale, 431, 432.

(*g*) Palm. 545.

(*e*) 1 Hale, 431; 1 Hawk. P. C.,

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that she was delivered of this child at the road side, between the Wellington Inn and Ledbury; and that, after the child was born, she had carried it a distance of about a mile to the place at which the child was found dead, which was also at the road-side. It further appeared, that this was a much frequented road, and that two waggon teams and several persons were on it about the time at which the child was left; and that a waggoner named Weaver, who was passing along the road, heard the child cry, but instead of going to render any assistance, he went on, and told some other persons, who went to the place where the child lay, and there found it dead from cold and exhaustion. The body of the child was quite naked. It further appeared that the prisoner had arranged with a woman, named Thomas, to be confined at her house; and that she should be paid 3s. 6d. a week to take care of the child.

C. Phillips, for the prisoner.—I submit, that this is a case of manslaughter only. It is quite evident that the prisoner had no original intention of destroying the child, as she had made arrangements for the taking care of it. There seems, also, to be equally little doubt, that she got out of the waggon when seized with the pains of labour^(h), and that, after the birth of the child, she carried it as far as her strength would allow her, and then laid it at the road side, hoping that some passer-by would render it assistance. It is also clear, that she did not miscalculate on the chance of the cries of the infant being heard by some one going along the road, as they actually were heard; and if the waggoner Weaver had taken up the child, instead of leaving it to perish, the life of the child would have been preserved.

(h) Some important information as to labour-pains being in some instances mistaken for colic, and as to the almost instantaneous birth of children, will be found in Dr. Hunter's work on Infanticide, p. 7;

Dr. Gordon Smith's Med. Jur., p. 368; and Par. and Fonb. Med. Jur., Vol. 3, p. 124, which are cited in Carr. Supp., 3rd. ed., App. p. xix. to xxi.

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COLTMAN, J., (in summing up).—If a party do any act with regard to a human being helpless and unable to provide for itself, which must necessarily lead to its death, the crime amounts to murder (i). But if the circumstances are not such, that the party must have been aware that the result would be death, that would reduce the offence to the crime of manslaughter, provided the death was occasioned by an unlawful act, but not such as to imply a malicious mind. There have been cases where it has been held, that persons leaving a child exposed and without any assistance, and under circumstances where no assistance was likely to be rendered, and thereby causing the death of the child, were guilty of murder. It will be for you, in the present case, to consider whether the prisoner left the child in such a situation that, to all reasonable apprehension, she must have been aware the child must die, or whether there were circumstances that would make it likely that the child would be found by some one else, and its life preserved, because then the offence of the prisoner would be manslaughter only. It is impossible to say that the offence of the prisoner can be less than manslaughter. It is for you to consider, whether, under all the circumstances, this child was left in such a situation that there was a reasonable expectation that it would be taken up by some one else and preserved. Suppose a person leaves a child at the door of a gentleman, where it is likely to be taken into the house almost immediately, it would be too much to say, that, if death ensued, it would be murder; the probability there would be so great, almost amounting to a certainty, that the child would be found and taken care of. If, on the other hand, it were left on an unfrequented place, a barren heath, for instance, what inference could be drawn, but that the party left it there in order that it might die. This is a sort of intermediate case, because the

(i) See the cases of *Rex v. Smith*, C. & P. 277; and *Reg. v. Edwards*, 2 C. & P. 449; *Rex v. Saunders*, 7 8 C. & P. 611.

child is exposed on a public road, where persons not only might pass, but were passing at the time; and you will, therefore, consider, whether the prisoner had reasonable ground for believing that the child would be found and preserved.

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Verdict—Guilty of manslaughter.

Greaves, and *W. H. Cooke*, for the prosecution.

C. Phillips, for the prisoner.

[Attornies—*Masefield*, and *Gough*.]

GLOUCESTER ASSIZES.

—◆—
(*Civil Side*.)

BEFORE MR. JUSTICE COLERIDGE.

Wood, Bart., and Others v. THOMPSON and Others.

Aug. 9.

ISSUES directed by Lord Langdale, Master of the Rolls, to try—

First—"Whether James Wood, deceased, did, by two paper-writings, bearing date respectively the 2nd and 3rd

If an issue be directed by the Court of Chancery, to be tried by a special jury, and a full special jury

do not attend, whether either party is entitled to pray a tales, without the consent of the other party—*Quere*.

On the trial of an issue directed by a court of equity, the judge will take notice of the terms of the order by which the issue is directed.

Issues of devisavit vel non were directed by the Master of the Rolls, who ordered that they should be tried by a special jury, but that none of the special jury should reside within twelve miles of G. (the assize town). There was no order as to the talesmen, and only eight special jurors appeared. The plaintiff's counsel prayed a tales; but the other party objected. The judge would not grant a tales, on the ground that, there being no order of the Master of the Rolls as to the talesmen, and their residing within twelve miles of G. being no legal ground of challenge, the talesmen could not be asked, on the *voir dire*, as to their residences; and that, if any of them did reside within twelve miles of G., the Master of the Rolls would probably order a new trial on that ground. The trial, therefore, stood over till the next assizes.

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days of December, 1834, devise his freehold estates, of which he was seised in his demesne as of fee, or not?

Secondly—Whether the said James Wood did, by the said paper-writings, devise the said freehold estate to Matthew Wood (being the plaintiff, Sir Matthew Wood), John Chadborn (now deceased), Jacob Osborn, and John Surman Surman, or not?

And, thirdly—Whether the said James Wood, deceased, did, by the said paper-writing, bearing date on the 3rd day of December, in the year last aforesaid, devise the said freehold estates to Matthew Wood (being the plaintiff, Sir Matthew Wood), John Chadborn (since deceased), Jacob Osborn, and John Surman Surman, or not.”

This was a special jury cause, and only eight special jurors appearing, *Kelly*, for the plaintiffs, prayed a tales.

Sir *F. Pollock*, for the defendants.—I must object to that prayer. The order of the Master of the Rolls, under which these issues are tried, contains this provision :—

“It is ordered, that the said issues shall be tried by a special jury of the county of Gloucester, to be nominated from the special jurors resident in the county, and not less than twelve miles from the city of Gloucester.” The trial of an issue under the order of an equity judge is entirely the creature of the Court of Equity, which has even gone the length of doubting whether a bill of exceptions could be tendered on such a trial. The subject matter of this action is a feigned wager on the title of the parties, and your Lordship would not allow such a question to be raised by the mere authority of the parties themselves. The present issues are merely a step taken to inform the conscience of the Court of Equity, and, in this particular case, the order provides that a particular class of persons should try the cause—not that the parties should proceed to trial in the ordinary way, nor leaving the mode of trial to the discretion of the court of common law to which the record belongs. The cause is to be tried, not by the ordi-

nary special jurors of the county, but by jurors resident not less than twelve miles from Gloucester. That being so, the cause cannot be tried with reference to the order of the Master of the Rolls, unless the number of such special jurymen is complete. It is quite clear that the object of the Master the Rolls was to have the conscience of the Court informed by a particular tribunal. There is no provision made for praying a tales. If a tales were to be granted, there would be no mode of ascertaining whether the supplemental jurors lived twelve miles from Gloucester or not; and I submit, therefore, that the plaintiffs have no right to pray a tales in the present case.

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Kelly.—It is very true that this is a proceeding directed by the Master of the Rolls, but upon the present record it is in form a mere common law action in the Court of Queen's Bench. The jury process is in the ordinary form, and I apprehend, therefore, that this proceeding possesses all the incidents of an ordinary common law action. If that be so, then the statute would apply, which provides, that when a special jury has been summoned, and there is not a full and sufficient attendance of special jurymen, it should be competent to the party on whose motion a special jury was granted to pray a tales; and if that party refuses, then that the other party might pray a tales. Now, what difference is there in this respect arising out of the fact that this action, instead of originating in the Court of Queen's Bench, is only an issue directed by the Master of the Rolls? The order of the Master of the Rolls cannot affect the statute under which a special jury is to be empaneled, and but for which statute there could not be any special jury at all. The Lord Chancellor, or the Master of the Rolls, have no power of themselves to nominate the special jury to try the cause. If, then, this proceeding were entirely the creature of the Court of Equity, as contended by my learned friend, the Master of the Rolls could not have ordered the cause to be tried by a special jury. I

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admit that the Lord Chancellor has the power, when directing an issue to be tried, to make it a part of the order that the cause should be tried by a special jury; but when once the order is made, the subsequent proceedings have all the incidents of a common law action. I conceive, therefore, that the moment the cause is in the Court of Queen's Bench, and is brought before your Lordship, if a special jury has been struck and summoned, and there be not a full attendance of special jurymen, there is the same right under the statute to pray a tales as there would have been if the suit had commenced in that court. I am not aware that there is any decision on the point; but upon principle I submit, that the plaintiffs are entitled to pray a tales, and, if that prayer be not granted, great injury and expense will result from a postponement of the trial to the next assizes.—There being no direct authority on the point, the case must be decided upon principle alone; and I submit, that directly that the cause came into a court of law, all the incidents of an action must follow. If, however, your Lordship should entertain any doubt about it, I should hope that your Lordship would see nothing irregular in postponing the cause until to-morrow, when a greater number of special jurors might be in attendance.

Austin, on the same side.—I submit, that this cause comes on to be tried as an ordinary action of assumpsit, and that there is nothing on the face of the proceedings which shews that it was sent down to be tried here by the Court of Chancery, and nothing, therefore, which in the least degree takes the cause out of the ordinary course of proceedings at common law.

Sir *F. Pollock*, in reply.—Very great injustice would arise from making a sort of experimental trial; and I submit, that the cause ought not to be tried at all, unless the trial is to be final, certain, and perfect. If the parties whom I represent, and who object to try this cause except by the special jury assigned by the Master of the Rolls,

should have the right hereafter to object to the verdict, what injustice would be done? The verdict of the jury would go forth, possibly creating considerable prejudices in the minds of persons resident in the county, and embarrassing any future jury in the exercise of their functions. Issues out of Chancery are not of very frequent occurrence; and I do not recollect any instance in which a tales had been prayed. There is, however, another point, which I think is not to be overlooked. If the Master of the Rolls had said, that either party should be at liberty to have a special jury, the case would not have presented itself in the same point of view. But here the Master of the Rolls has imposed special conditions, with which it was necessary to comply. The prayer of a tales is grounded upon the assumption that this is an ordinary *Nisi Prius* record. That is a complete misconception. This cause would not have been tried, unless it were under the order of the Master of the Rolls; and even now, if the cause should be tried, and a new trial should be moved for, every one knows that the parties would not go to the Court to which the record belonged, but to the Judge in equity. In the case of *Armstrong v. Lewis* (a), the right to tender a bill of exceptions on the trial of an issue out of Chancery was denied by Sir *J. Leach*; and the Lord Chancellor, upon appeal, approved of that doctrine. I submit, therefore, that, upon authority, as well as upon principle, this application cannot be granted. But further, if my learned friends are right in their view, they might as well try the cause with one special and eleven common jurymen, as with one common jurymen and

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(a) 3 M. & K. 52. In that case there had been a bill of exceptions, and it was held by Sir *J. Leach*, M. R., that, upon the trial of an issue directed by a court of equity, a bill of exceptions for an alleged misdirection of the judge will not lie; but the regular course is to apply to the Court which directed the issue for a new trial; and the Lord Chancellor *Brougham*, in the same case, says, that "considerable error appears to have prevailed in several stages of the proceedings, including those at *Nisi Prius*."

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eleven special jurymen. And assuming that a tales were taken from the common jury panel, am I to inquire whether a common jurymen lives twelve miles from Gloucester? What right have I, either at common law or otherwise, to challenge him on the ground that he resides within twelve miles of this city? The order of the Master of the Rolls says nothing about the common jurors. If my learned friends had wished to have the power to pray a tales, they should have asked the Master of the Rolls what was to be done in case there were not a sufficient number of special jurymen, but they have neglected to do this. I submit, therefore, that the plaintiffs have no right to pray a tales.

COLERIDGE, J., (having conferred with COLTMAN, J.).—This is a case of extreme importance both as regards the feelings that prevail upon the cause, and the property which is at stake, and I therefore come to the conclusion at which I have arrived with very great regret. It seems to me, that, in deciding this case, I ought to look to the justice and injustice which would result from my decision; and though it is impossible not to feel the force of the argument which points to the inconveniences of delay, I think that, in determining the real point of the case,—namely, whether the trial, if it now took place, would be valid or not,—the hinge of the question is, whether I am, or am not, to take notice of the order of the Master of the Rolls? On the one side, it is said, that this is a record, which, on the face of it, has all the incidents of a special jury cause, and that I must look at it as such; while, on the other side, it is said, “You must look at the order of the Master of the Rolls;” and it seems to me that I cannot but look at it. In point of form, it is not before me; but I think I must consider it as if it were. Now, I find the order says, that the cause is to be tried by a special jury of the county, to be nominated from the special jurors resident in the county, and not less than twelve miles from Gloucester. What would be the effect, if common

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jurymen were to be called upon to serve on this jury, who resided within one mile of Gloucester? This is not a cause of challenge independently of the order; and I think, therefore, that I could not advance a step without taking notice of the order. If, then, I am to take notice of the order, is the grant of a tales in strict compliance with its terms? I am not acquainted with the intentions of the Master of the Rolls in directing this issue to be tried; and I am not merely ignorant of them in point of form, but I actually do not know what they were. How, then, can I tell what objects his Lordship may have had in view when he directed this cause to be tried by a special jury composed of persons resident not less than twelve miles from the city of Gloucester? If a tales were granted at all, it might just as well be granted where but one special juror had appeared, and the jury would be composed of him and eleven common jurors, as where there were eight special to four common jurymen. It appears to me, therefore, that I have no right to go beyond the terms of the order. My Brother *Coltman*, with whom I have had as much consultation as the time would permit, says, that, in his opinion, the trial, if it now proceeded, would go for nothing, and that the Master of the Rolls would order a new trial. If so, I should be accessory to an act of great injustice, if I allowed it to go on. It occasionally happens that the facts of a case are so little known, that the first trial does not elicit the whole truth, but, ordinarily speaking, I have long thought that a second trial is not satisfactory. It appears to me, therefore, that the ends of justice would be best answered by postponing this trial till the next assizes, however much I may regret the expense which has been incurred in preparing for it.

Kelly applied for a postponement of the cause for a few hours, as coaches were shortly expected from Bristol, which might bring a few special jurymen.

COLERIDGE, J.—I think that I cannot grant the application.

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Kelly offered to try the case by the eight special jurors who appeared; but Sir *F. Pollock* not consenting, the case was—

Postponed to the next assizes (b).

Kelly, Austin, Cripps, and Butt, for the plaintiffs.

Sir *F. Pollock, Talfourd, Serjt., C. Phillips, Whitmore, and J. W. Smith*, for the defendants.

[Attornies—*Fyson & Meredith, and Reeve.*]

(b) The absent jurors were each fined £50.

REGINA v. TOWNSEND.

It was proved that a post-office letter-carrier was in the daily habit of calling at the lodge of the G. Infirmary, and there receiving letters, with a penny on each to prepay the postage; and that he took them, with the penny, to the G. post-office; and that, during his illness, a person who had performed his duties did the like. There was no evidence of any appointment:—*Held*, in an indictment under the stat. 2 Will. 4, c. 4, s. 1, for embezzling some of the pence thus received, that this was evidence to go to the jury, that the pence were received by the prisoner by virtue of his employment as a letter-carrier.

EMBEZZLEMENT.—The prisoner was indicted, under the stat. 2 Will. 4, c. 4, s. 1 (a), for embezzling money received by him, by virtue of his employment as a letter-carrier.

It appeared that the prisoner was a letter-carrier employed by the post-office to deliver letters about Gloucester, and that he had been in the habit of calling at the lodge of the county of Gloucester Infirmary, and receiving letters there, and a penny upon each to pre-pay their postage, and that his practice was to deliver these letters at the Gloucester post-office. It also appeared that he sometimes omitted to call at the lodge, and then the letters were taken by some person and put in the post; and that during the time he had been ill, another person who performed his duties had also called at the lodge and received the letters and the pennies, and delivered them at the post-office in the same way as the prisoner. No evidence was given of the prisoner's appointment, or of the terms of it. Evidence was given with a view of shewing that the prisoner had received letters and the penny postage at the lodge of the Infirmary, and had put obliterated stamps upon the letters and embezzled the pence.

(a) Set out 6 C. & P. 124, n. (a).

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Greaves, for the prisoner.—There is no evidence that the money was received by the prisoner by virtue of his employment. It was the mere voluntary act of the prisoner to go and receive the letters and the postage; he was neither bound to go to the lodge nor to receive the letters; and, in order to prove that the money was received by virtue of the employment, it must be shewn that it was the duty of the prisoner to receive the money. Can it be contended, that every one has a right to insist upon a letter-carrier receiving letters in the street? And can it be said, that, if a letter were so received, and the postage for it, it was received by virtue of the employment, unless the carrier would be guilty of a breach of duty in not receiving. If, by refusing to receive it, he would not be guilty of a breach of duty, it would not be a receiving by virtue of the employment, if the money were received. I admit that it is sufficient, to show that the prisoner has acted as a letter-carrier, to prove that he holds that situation (b); but where the charge is of having embezzled money received by virtue of such employment, under circumstances out of the ordinary course, I submit, that such evidence as has been given in this case is insufficient.

COLERIDGE, J.—I think there is evidence to go to the jury. The case does not rest simply on what was done by the prisoner, but there is also the fact, that the person who performed his duties during his illness pursued the same course as the prisoner.

Verdict—Not guilty on the merits.

Ludlow, Serjt., and *W. J. Alexander*, for the prosecutor.

Greaves, for the prisoner.

[Attornies—*Peacock*, and *Smallridge*.]

(b) See the cases of *Rex v. Borrett*, 6 C. & P. 124, and *Rex v. Rees*, *Id.* 606.

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GLOUCESTER CITY ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE COLTMAN.

REGINA v. PHELPS, SOUTHAN, and SMITH.

A police-officer found N. with potatoes under his shirt, which had been very recently dug from the ground, and apprehended him. The policeman called O. to assist him; O. did so; and a rescue being attempted, O. was going away, and was struck by A., who went away, and O. was afterwards killed by other persons, who attempted the rescue:—*Held*, that the police officer had no right to apprehend N., and that the killing of O., therefore, did not amount to murder; and that, on an indictment for murder, A. could not be convicted of an assault:—*Held*, also, that a person charged to aid a constable, and who does so, is protected *eundo, morando, et redeundo*.

A., B., and C. were indicted for murder: in the first count, as principals in the first degree; and in the second count A. was indicted as a principal in the first degree, and B. and C. as principals in the second degree; and the grand jury ignored the first count as to B. and C., and found a true bill, on the second, against all. *Seemle*, that B. and C. might be convicted on the second count as principals in the murder, although A. was acquitted.

A count charged A. with a murder, and charged that B. and C., "at the time of the felony and murder *was* committed, to wit, on &c., at &c., were feloniously present, *then and there* abetting, aiding, and assisting," &c. *Seemle*, that the word "*was*" may be rejected as surplusage; but whether, even rejecting that word, this be a good form of charging aiders and abettors—*Quere*.

A prisoner, in a case of murder, may demur; and if his demurrer be overruled, he may still plead not guilty; and *seemle*, that he may demur and plead over to the felony at the same time.

MURDER.—The first count of the indictment charged all the prisoners as principals, in the first degree, with the murder of John Overbury, by striking and beating him. The second and third counts charged the prisoner Phelps as a principal in the first degree, and the prisoners Southan and Smith as principals in the second degree, in the following terms:—That the said Southan and Smith, "at the time of the felony and murder *was* committed, to wit, on &c., at &c., were feloniously present, *then and there* abetting, aiding, and assisting the said John Phelps, &c."

The coroner's inquisition charged Phelps as principal in the first degree, and Southan and Smith as principals in the second degree, in the same terms as the second and third counts in the indictment, omitting the word "*was*." The grand jury had found a true bill generally against Phelps, but a true bill against Southan and Smith on the second and third counts only.

Upon the arraignment of the three prisoners, the prisoner Phelps pleaded not guilty.

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Greaves, for Southan and Smith, proposed to put in both a demurrer and a plea of not guilty to the indictment, and the like to the inquisition. He cited the case of *Rex v. Taylor* (a), and submitted that he was entitled either to demur and plead not guilty at the same time, or to demur, and if the demurrer were decided against him, to plead over to the felony. He also cited 4 Ch. Cr. L. 517, n. a; 2 Hale, P. C. 257; and *Rex v. Gibson* (b).

W. J. Alexander, for the prosecution, objected to both pleading and demurring at the same time, as being totally inconsistent with every principle of pleading, and sanctioned by no authority.

Greaves.—If the course be inconsistent, it has at all events the sanction of some of the greatest names known to the law (c). It is not surprising that instances may not be found, as it is only since the stat. 7 Geo. 4, c. 64, that it has become important to demur, as, before that statute, every objection was open in arrest of judgment or on error after verdict, in the same way as if there had been a demurrer; and since that statute, the course with some judges has been to reserve the point, *rebus sic stantibus*, as if the point had been taken on demurrer.

(a) 3 B. & C. 502.

(b) 8 Ea. 107.

(c) In the cases where pleas of *auterfois* acquit have been pleaded, the prisoners have, in some instances, at the same time pleaded over to the felony, and in others not. They did so, in the cases of *Rex v. Vandercomb*, 2 Leach, 822, 2 Ea. P. C. 519, and *Rex v. Welch*, M. C. C. 175; and did not do so in the cases of *Rex v. Sheen*, 2 C. & P. 634, and *Rex v. Parry*, 7 C. & P.

836. In the case of *Rex v. Vandercomb*, the pleading over to the felony was considered to be necessary; and in the case of *Rex v. Hedgecock*, (4 Ch. Cr. L. 530, b.), it being objected to a plea of *auterfois* acquit that it did not go on to plead over to the felony—Baron *Hullock* and Mr. Justice *Littledale* overruled the objection, and held that the prisoner might then plead over to the felony.

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This was done by Mr. Justice *Patteson*, in the case of *Reg. v. Cruse* (d). But in so important a case, I do not feel justified in running any risk, especially as Baron *Gurney*, in the case of *Reg. v. Curnock* (e), held, that he would not hear any objection to an indictment after plea pleaded, and before verdict; and I therefore pray leave both to demur and plead not guilty at the same time.

COLTMAN, J.—I am inclined to think that the prisoner may demur and plead over to the felony at the same time. Mr. Serjeant *Hawkins* says, that a demurrer shall not conclude the prisoner from pleading over to the felony, either at the same time with the demurrer, or after it shall be adjudged against him; and he cites, as an authority for both pleading and demurring at the same time, *Smith v. Bowen*, Mich. 7 Annæ, in which case the demurrer was continued on the record, with a cesset triatio exitus &c., and after the demurrer was determined against the defendant, a venire was awarded (f). At all events, I am clearly of opinion, that the prisoners may demur, and if the demurrer should be decided against them, they may plead over to the felony.

Greaves.—As my only object is to prevent the prisoners from incurring any risk by demurring alone, and as your Lordship is clear they may afterwards plead not guilty, I will put in the demurrer alone first. (He then read from a piece of paper a demurrer to the second and third counts of the indictment, and another demurrer to the inquisition).

W. J. Alexander, for the prosecution, joined in demurrer.

Greaves, in support of the demurrer.—In the case of *Reg. v. Nicholson* (g), it was held, upon an inquisition,

(d) 8 C. & P. 541. (e) 9 C. & P. 730. (f) 2 Hawk. P.C., Book 2, c. 31, s. 6.
(g) 7 C. & P. 538.

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word for word the same as these counts and this inquisition, that the introduction of the words "then and there" between "present" and "abetting" rendered the inquisition bad. Secondly, the words "at the time of the felony and murder was committed" are wholly insensible. It is impossible to reject any word, because it cannot be seen which word is surplusage; "murder" might be the nominative case to "was." Thirdly, as the grand jury have ignored the first count, the other counts are bad, as there is no addition or description of the prisoners in them. The effect of the finding of the grand jury is, that *nothing* contained in the first count was proved to their satisfaction. Again, as it is perfectly immaterial in murder whose was the hand that inflicted the mortal blow, the same evidence that would support the first count of this indictment would support the second or third, and vice versa; and if the prisoners had been tried and convicted, or acquitted, on the first count, they might have successfully pleaded *auterfois acquit*, or *auterfois convict*, to the second and third counts: in point of law, therefore, the finding of the grand jury was not merely uncertain, but contradictory; for, at the same instant, they ignored and found counts for identically the same offence.

COLTMAN, J.—*Rex v. Nicholas* is certainly a grave authority in favour of the first objection; but I think, in so serious a case, I ought not to decide the point here. As to the second objection, I am rather disposed to think that the word "was" may be rejected as surplusage. As to the finding of the grand jury, my impression is, that it must be taken as if there had been no first count. I will, however, reserve all the objections, if it becomes necessary.

The prisoners, Southan and Smith, then pleaded not guilty.

It appeared that a policeman, having heard that many

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gardens had been robbed, and finding a person named Norris, with potatoes concealed on his person, under his shirt, apprehended him on suspicion of having stolen them from some garden. The potatoes were new potatoes, fresh dug out of the earth, and did not appear to have been got out of the ground more than half an hour. Norris was apprehended at a public house in the city of Gloucester, on the night of the 21st of July, 1841; and there was no evidence of his having been in any garden, or of where the potatoes came from. Norris resisted the policeman, who charged John Overbury, (the deceased), to aid and assist, and he did so for some time, and then went away, and as he was going away, the prisoner Phelps struck him several times, and he was afterwards killed by violence; but the evidence went to show, that the prisoner Phelps had gone away before the violence, which caused the death, was inflicted; but that the prisoners Southan and Smith might have inflicted such violence, or been present when it was inflicted, about a quarter of an hour afterwards.

Greaves.—The policeman had no right to apprehend Norris; and even if he had, Overbury (the deceased) had ceased assisting when he was struck.

COLTMAN, J.—He would be entitled to protection *eundo, morando, et redeundo*.

Greaves.—At common law, stealing potatoes out of the ground, is neither a felony nor misdemeanor; and it is only punishable by the 7 & 8 Geo. 4, c. 29, s. 43; and (without a warrant), a policeman could only apprehend a person whom he *found* committing the offence, and that immediately, under the 63rd section of that statute. The case of *Rex v. Curran* (*h*) goes expressly to this point.

(*h*) 3 C. & P. 397; but see the case of *Hanway v. Boulbee*, 4 C. & P. 350.

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COLTMAN, J.—I am satisfied that the policeman was not justified in apprehending Norris under the 63rd section of the stat. 7 & 8 Geo. 4, c. 29. If Norris had committed a second offence after a previous conviction (i), it is a felony, and there the policeman might apprehend by common law.

Greaves.—There is no evidence of Norris ever having stolen potatoes before, still less of a previous conviction, and no presumption of such facts ought to be made, but the contrary.

COLTMAN, J.—I think the evidence does not show that the policeman had a right to apprehend Norris; and I think, in so serious a case, that that ought to be very clearly made out.

Greaves.—Then assuming that Phelps cannot on this evidence be convicted, because he was not present when the fatal blow was struck, so neither can Southan or Smith; for the grand jury have ignored the count, which charged them as principals in the first degree; and if they were convicted on the 2nd and 3rd counts, on the supposition that they inflicted the blow, and on the ground that it was immaterial by whom the blow was struck, they would be convicted of one offence upon a count which the grand jury must have found for another offence.

COLTMAN, J.—I am disposed to think that they may be so convicted; but I will reserve the point if necessary.

Godson, and *Greaves*, addressed the jury for the respective prisoners.

COLTMAN, J., (in summing up).—You will be relieved

(i) Under the stat. 7 & 8 Geo. 4, c. 29, s. 42.

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from inquiring into the charge of murder, because an irregularity has taken place in the conduct of the policeman at the outset. In law, he had no right to apprehend a person on suspicion of having stolen growing potatoes out of a garden, as the law does not regard such an offence as a felony; unless, indeed, the person had been previously fined before a magistrate for a similar offence. Had the potatoes been stolen from a place of deposit, such as a storehouse or a warehouse, the case would have been different. If you think that Phelps went away before the fatal blow was struck, he can at most only be convicted of an assault; but with respect to the other prisoners, you must either convict them of manslaughter, or acquit them altogether, as the same evidence which goes to show that they assaulted the deceased, goes equally to show that they killed him.

Verdict.—Phelps guilty of an assault—
Southan and Smith—Not guilty.

Godson.—I submit that Phelps cannot be convicted of an assault in this case, as the assault was totally independent of the felony. It is only where the assault is included in the felony charged, that a conviction for an assault can take place. This case is the same as if Phelps had struck the deceased, and afterwards, some person wholly unconnected with Phelps, and not knowing that he had struck the deceased, had killed the deceased after Phelps had gone away. The cases of *Reg. v. St. George (k)*, *Reg. v. Guttridge (l)*, are authorities in my favour.

COLTMAN, J.—I will reserve the point for the consideration of the fifteen judges.

W. J. Alexander and Francillon, for the prosecution.

(k) 9 C. & P. 483.

(l) *Id.* 471.

Godson and *Keating*, for the prisoner *Phelps*.

Greaves, and *W. H. Cooke*, for the prisoners *Southan* and *Smith*.

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[Attornies—*Horne & Harvey*, and *Smallbridge*.]

In the ensuing Term, the case was considered by the Fifteen Judges, who were of opinion, that the conviction of the prisoner *Phelps* for the assault was wrong.

CENTRAL CRIMINAL COURT.

JANUARY SESSIONS, 1841.

BEFORE MR. JUSTICE MAULE AND MR. BARON ROLFE.

REGINA v. JOHN CRISHAM.

THE indictment stated that one Peter M'Donough upon one Bridget Lamb did make an assault, and her the said Bridget Lamb violently, feloniously, and against her will did ravish, &c.; and went on to state that the prisoner was present, and feloniously aided and assisted the said Peter M'Donough in the commission of the said felony, contrary to the statute, &c. After a verdict of guilty—

Jan. 7.

An indictment is good which charges that A. committed a rape, and that B. was present aiding and assisting him in the commission of the felony. In such a case the party aiding may be charged either, as he was in law, a principal in the first degree, or, as he was in fact, a principal in the second degree.

Payne, for the prisoner, moved in arrest of judgment.—The indictment charges the prisoner with aiding and assisting M'Donough in the commission of a rape, contrary to the statute. Now, there not being any statutory provisions applicable to persons aiding and abetting in cases of this nature, I submit that the indictment is wrongly framed. The prisoner, in the absence of any express pro-

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vision by statute, should have been indicted as at common law; and the indictment should have charged him as a principal, and stated that he, as well as M'Donough, ravished the prosecutor. In *Folkes's case* (a), an indictment, charging the prisoner both as principal in the first degree, and as aiding and abetting other men in committing a rape, was held after conviction to be valid on the count charging the prisoner *as principal*. The statute of 9 Geo. 4, c. 31, which declares, in the 16th section, that every person, convicted of the crime of rape, shall suffer death, makes no specific provision as to aiders and abettors, with reference to that offence. The 7 & 8 Geo. 4, c. 29, and the 7 & 8 Geo. 4, c. 30, make provision for principals in the second degree, with reference to the felonies mentioned in them respectively; but the stat. 9 Geo. 4, c. 31, does not contain any such provision with respect to the offence of rape.

MAULE, J.—Then your objection is, that the offence which has been committed is not stated in the indictment.

Payne.—My objection is, that the person is not charged, as he ought to have been, *as a principal*.

ROLFE, B.—Is he not so charged in the indictment? It alleges that M'Donough committed a rape, and the prisoner aided and assisted him. Is not that another way of saying that the prisoner committed a rape?

MAULE, J.—There does not appear to me to be any ground for the objection. It has been already decided that, in a case of this description, the party may be charged according to the fact, or indicted as a principal in the first degree (b).

Payne, for the prisoner.

(a) 1 Moo. C. C. R. 354.

(b) See the case of *Reg. v. Gray* and *Howe*, 7 Carr. & Payne, 164, in which Mr. Justice Cresswell held

that a count similar to that in the above case was good. See also the case of *Reg. v. Phelps*, ante, p. 180.

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FEBRUARY SESSION, 1841.

BEFORE THE HON. CHARLES EWAN LAW, RECORDER.

In the Matter of Frederick George White.

Feb. 1st.

ON the first day of the Session, Mr. Frederick George White, who carried on the business of a wharfinger at Kennett wharf in Upper Thames Street in the city of London, was called, in pursuance of a summons which had been duly served, to appear and serve on the petty jury for the trial of prisoners, but not appearing was ordered to be fined £20.

On the 15th of February, notice in writing was sent to Mr. White by Mr. Clark, the clerk of the Court, informing him of the fine, and stating that it would be estreated into the Exchequer, unless he should make sufficient excuse by affidavit, at the next sitting of the Court, on Monday the 1st of March.

In consequence of this notice, Mr. White made the following affidavit:—

“ In the Central Criminal Court.

“ Frederick George White, of &c., maketh oath and saith, that he this deponent is exempt from serving on juries for the city of London or elsewhere, being a freeman of the Barbers' Company of the said city of London, established in pursuance of an act of Parliament made and passed in the 18th year of the reign of King George the Second, intituled, ‘ An Act for making the Surgeons of London and the Barbers of London two separate and distinct Corporations.’ And this deponent further saith, that he hath, by virtue of the said act, been exempted on a previous occasion at this Court, and also at the Secondaries Court, Basinghall Street, from serving on juries. And this deponent further saith, that a letter was sent, on the 1st

The exemption from serving as jurymen, claimed by the members of the Barbers' Company under the charters of 1 Edw. 4, and 5 Car. 1, and the stat. 18 Geo. 2, c. 15, does not extend to the Central Criminal Court, but is confined to the local courts of the city, viz. those holden before the mayor, the sheriffs, or the coroner.

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day of February last, by this deponent, stating the ground of such exemption."

On this affidavit being read to the Court,

LAW, Recorder, said, that, in his opinion, the exemption claimed was not sustainable in law; but, under the circumstances, he directed the fine to be taken off, and the party to be summoned again for another Session, in order that in the meantime the opinion of some of the Judges might be taken upon the subject.

The matter was accordingly brought to the notice of several of their Lordships.

The statute 18 Geo. 2, c. 15, passed in the year 1783, which was relied on by the party claiming the exemption, was referred to.

The preamble, in reciting the letters patent of the 1st year of King Edw. 4th, contained, inter alia, this passage: "And his said Majesty did further grant, that the said masters or governors and commonalty of the said mystery of barbers *and their successors*, nor any of them, should in *any manner* thereafter be *summoned or put upon* any assizes, *juries*, inquests, inquisitions, attaints, or other recognizances to be taken *within the said city and suburbs* thereof, *before the Mayor or Sheriffs or Coroners* of the same city for the time being, or summoned by any of his officer or officers, minister or ministers, although such *juries*, inquisitions, or recognizances, should be summoned upon a writ or writs of right; but that the said masters or governors and commonalty of the aforesaid mystery and their successors, and every of them, should be thereof acquitted and wholly discharged for ever."

Also, in reciting the act of 32 Hen. 8th, which incorporated and united the barbers of London and the surgeons of London, the preamble of the 18 Geo. 2, c. 15, inter alia, states, that it was enacted, "That all *persons of the said company incorporated* by the said act and *their successors*, that should be *lawfully admitted* and approved to *occupy*

surgery after the form of the statute in that case made and provided, should *be exempt* from bearing of armour, or to be *put in any watches or inquests*.

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The stat. 18 Geo. 2, c. 15, further recites the charter of 5 Car. 1, confirming and enlarging the privileges of the united corporation; and then proceeds to enact, that, from and after the 24th of June, 1745, the said union and incorporation of the barbers and surgeons of London should be dissolved; and the members who were admitted and approved surgeons, and their successors, should be a separate and distinct body corporate. After making several regulations relating to the surgeons, and enacting that they shall have certain privileges, so long as they shall exercise the art of surgery and no longer, among which privileges, an exemption "*of and from being put into or serving upon any jury or inquest,*" the act proceeds to make provision with respect to the barbers; and among other things, with respect to them, it enacts as follows:—"That the master, governors, and commonalty of the mystery of barbers of London, hereby made, established, and incorporated as aforesaid, and their successors, and all persons who shall be free of the same company or corporation, shall and may, from time to time and at all times for ever hereafter, have, hold, and enjoy, all and every such and the *same liberties, privileges, franchises, powers, and authorities, as the said united company* or corporation, *with respect to every thing but surgery,* and the members of the said united company occupying the feat or craft of barbery or shaving, could or might respectively have had, held, and enjoyed, by virtue of the said recited act of union or incorporation, and letters-patent of his late Majesty King Charles the First, *and other the royal grants, charters, and patents* therein respectively mentioned and referred to, so far as the same do not concern or relate to the art and science of surgery; and that in as full, ample, and beneficial manner, to all intents and purposes, as if the same had been expressly repeated, set down, and enacted in and by this present act."

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The Judges to whom the question was submitted, were of opinion that the Recorder was correct in his decision, that the exemption of the freemen of the Barbers' Company did not extend to the Central Criminal Court; and their Lordships considered that, under the words of the charter of 1 Edw. 4, confirmed by the stat. of 18 Geo. 2, it was confined to the local Courts of the city, viz. such as are held before the Lord Mayor, the Sheriff, or the Coroner.

In consequence of this, in the December Session of the same year, when a person named Stone, who had been summoned as a juryman, stated that he was a member of the Barbers' Company, and claimed exemption from serving on that ground,

LAW, Recorder, said, that the exemption only extended to the local Courts of the city, and did not apply to the Central Criminal Court. And he added, that he had consulted several of the Judges upon the subject, and had their authority for saying, that they agreed with him in the opinion which he had formed.

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MARCH SESSION, 1841.

BEFORE MR. JUSTICE WILLIAMS AND MR. COMMON SERJEANT

MIREHOUSE.

REGINA v. JOHN DOUGLAS, Esq.

March 3rd.

THE first count of the indictment stated, that the prisoner, describing him as late of the parish of Wandsworth, in the county of Surrey, Esq., and Henry Maxwell Wainwright, late of the same place, Esq., on the 12th day of September, in the 4th year of the reign of our Sovereign Lady Victoria, with force and arms at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the Central Criminal Court, with a certain pistol then and there loaded with gunpowder and a leaden bullet, at and against one Harvey Garnett Phipps Tuckett then and there being, then and there feloniously, wilfully, and unlawfully did shoot, with intent thereby then and there feloniously, wilfully, and of their malice aforethought, the said Harvey Garnett Phipps Tuckett to kill and murder, against the form of the statute &c., and against the peace &c.

Where a captain in the army surrendered in discharge of his bail to take his trial at the Central Criminal Court, for feloniously shooting at another (in a duel), with intent to kill him, &c., it was *held*, that he must take his place within the dock like all other prisoners charged with felony; but on his expressing a wish to that effect he was allowed to have three friends to stand beside him there.

Where the indictment charged that a person shot at one Harvey Garnett Phipps Tuckett, it was *held*, that Tuckett's card, though given to one of the witnesses in the presence of the party charged, could not be given in evidence against him on his trial to prove the name, as its contents were not shewn to have been communicated to him.

There were other counts charging the intent to be to maim and disable, and to do grievous bodily harm.

The bill was ignored against Captain Wainwright.

On the 3rd of March, 1841 (*a*), Captain Douglas surren-

ett's card, though given to one of the witnesses in the presence of the party charged, could not be given in evidence against him on his trial to prove the name, as its contents were not shewn to have been communicated to him.

Where an indictment for felony was found at the Central Criminal Court against a peer of the realm and several commoners, at a time while the Houses of Parliament were not sitting, the recognizances of the commoners were respited from session to session, until after the case of the peer had been disposed of in the House of Lords.

(*a*) The Earl of Cardigan had been previously tried by his peers, on an indictment charging him with the same offence, and acquitted on the same ground as Captain Douglas.

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dered in discharge of his bail, for the purpose of taking his trial (*b*).

Thesiger, who was counsel for him, applied to his Lordship to allow him to stand outside the dock.

WILLIAMS, J., declined to grant the application.

Thesiger submitted, that, if Captain Douglas were committed to the custody of the Sheriff, it would be sufficient, without requiring him to go into the dock.

WILLIAMS, J.—It is an ordinary case of felony. I cannot make a distinction between one person and another.

Captain Douglas then went into the dock, and pleaded “not guilty” to the indictment (*c*).

Application was then made that some of his friends might stand beside him in the dock.

WILLIAMS, J.—Prisoner, is it your wish that some of your friends should be near you?

The prisoner replied in the affirmative

WILLIAMS, J.—There is no objection to it if you wish it.

Three friends of the prisoner were then allowed to remain with him in the dock during the trial.

On the part of the prosecutor, Thomas Hunt Dann, constable of the parish of Wimbledon, having a house and mill on Wimbledon Common, Sarah Dann his wife, and Sebastian Byron Dann his son, were called as witnesses.

(*b*) The indictment was found at the October Session of 1840, but the recognizances of Captain Douglas were respited from session to session, in order that the House of

Lords might first dispose of the case against the Earl of Cardigan.

(*c*) See the case of *Reg. v. St. George*, 9 C. & P. 483, and the authorities there referred to.

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They proved that a duel was fought on the 12th of September, between Lord Cardigan and another person, but did not identify the prisoner, Captain Douglas, as the second of Lord Cardigan; on the contrary, Mrs. Dann pointed him out as Captain Tuckett, the person who was wounded.

Sir James Eglinton Anderson was then called. In answer to questions from the Judge, he said, "I am a physician;" but, on being questioned as to whether he was at Wimbledon on the 13th of September, he said, "As my answering that question may involve me in some difficulty, I trust your Lordship will not press it. I am apprehensive that my answering any question affecting Captain Tuckett may implicate myself."

WILLIAMS, J.—Do you know Captain Tuckett?

Witness.—I do.

WILLIAMS, J.—When did you last see him?

Witness.—The whole bearing of this question would tend ultimately to implicate myself. I trust your lordship will not press me to answer.

WILLIAMS, J.—Was he well or ill when you saw him last?

Witness.—I fear the same answer must be given to that.

WILLIAMS, J.—Then I understand you to decline answering any question about a visit to Wimbledon or Putney, on the 12th of September?

Witness.—I do; upon that principle—

WILLIAMS, J.—That it may tend to implicate yourself?

Witness.—Yes.

WILLIAMS, J.—Then you may stand down.

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The only other witness to prove the facts of the case was John Busain, who said, "I am police inspector of Wandsworth; a little before six o'clock in the evening of the 12th of September last, two cases of duelling pistols were given me by Dann, the miller; I know Lord Cardigan; he came into the station before the pistols were delivered; I knew nothing of the duel; Captain Douglas was with Lord Cardigan; he gave his 'name, John Douglas, captain of the 11th Hussars,' by word of mouth; that was on Saturday evening; they did not go before the justices till Monday morning; I took down the charge from Dann; it was taken in writing; I have not got it here; I was not ordered to bring it; I know the person of Captain Douglas; he is at the bar now; Lord Cardigan and he were together at the station till they were bailed, which was almost immediately after; when Lord Cardigan came in, he said he was a prisoner, he believed; I said, 'What for?' He said he had been fighting a duel he believed; and *as Captain Douglas came up the steps he pointed his finger over his shoulder, and said, 'So is this gentleman also, my second, Captain Douglas,' a part of the conversation took place before Captain Douglas came up; and Lord Cardigan said he was a prisoner, he believed; Captain Douglas could hear that; he was close enough to have heard it; I do not remember that he made any remark upon it.*" On his cross-examination the witness, among other things, said, "When Lord Cardigan pointed, Captain Douglas had just stepped up to the door-sill; he had just come into the office; it takes no time to get up the steps; *it is true that when Lord Cardigan said what he did, Captain Douglas was coming up the steps;* I was close by Lord Cardigan; there was not the least occasion for Lord Cardigan to speak loud to make me hear."

Thomas Hunt Dann was then recalled, and said, "There were five gentlemen altogether in the yard; I can undertake to say that those five were the four that were on the ground, and the fifth at Currie's garden; I am sure of that; *a card*

was given me by some one, who I understood was Captain Tuckett or Captain Wainwright, the other two were close to me at the time; they were all five in the yard; Lord Cardigan was farthest from me. I do not remember any thing being said when the card was given me, any more than that it was a card of their address; this is the card."

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Thesiger objected to the reception of the card.—I will assume that Captain Tuckett gave the card himself, yet the contents do not appear to have been communicated to Captain Douglas; and, therefore, it is not evidence against him.

WILLIAMS, J.—It does not appear that anything was said to bring it to the cognizance of Captain Douglas. I think it is sufficiently doubtful for me not to receive it.

Thomas Bicknell, the superintendent of the V division of police, who was bound over to prosecute by the magistrates, was then called.

WILLIAMS, J., said to him, "I have examined all the witnesses of whom there are any depositions; and I have called all those of whom I have any knowledge by their names being on the back of the bill:—Is there any other witness, of whose presence you are aware, who can give any evidence concerning this transaction?"

The witness replied, that the only other witness of whom he knew was Mr. Fletcher, the clerk to the magistrates at Wandsworth; but he was not aware what evidence he had to give.

Mr. Fletcher was called, and said, "I was subpoenaed a few days ago by Mr. Hobler, the solicitor for the prosecution, and I attended here in consequence; I know nothing of the transaction, except the circumstances which took place before the magistrates; I am the clerk; the deposi-

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tions were returned to this Court, they did not go to the House of Lords in the first instance; there were other depositions taken besides those on the previous examination of the prisoners, and the substance of them is embodied in this evidence, which is the final examination; I am not aware of any witnesses except those whose names have been called."

WILLIAMS, J., did not call on *Thesiger* to address the jury, but himself said—All the evidence having been gone through, it remains for me to remark that there is no case to be submitted to your consideration at all. Not that we can close our eyes to the fact that there was a duel fought, but the charge is, that the prisoner did shoot at one Harvey Garnett Phipps Tuckett. There is no evidence that a man of that name (and it is by names that men are known one from another) was shot at on the day in question, by the prisoner at the bar. The card, if it could have been legally produced in evidence, would not have carried it any farther, for it contained only the name of "Captain Harvey Tuckett;" and that would be no more evidence that the person so named was *of necessity* the person having two additional names, than it would be that John Thomas is Peter Nokes. I may also remind you, that no person has sworn to the presence of the prisoner Captain Douglas at all. There certainly was evidence of the fact of Lord Cardigan having said, in the hearing of Captain Douglas, that he was his second; but that evidence would have been subject to observation. I should, however, have submitted it to you, such as it is, if the preliminary matter had not altogether failed. The consequence of all this is, that the indictment falls to the ground, and the prisoner must be acquitted.

Verdict—Not guilty.

Thesiger, Wrangham, Serjt., and *Bodkin*, for the prisoner.

[Attorney—*Powell*.]

The indictment against Lord Cardigan was found at the Central Criminal Court in the October Sessions, at which time the House of Lords was not sitting. Application was therefore made by *Adolphus*, as counsel for his Lordship, to have his recognizances respited from session to session, as he was entitled to be tried by his Peers. In Hawkins's Pleas of the Crown, chap. 44, s. 15, it is said, "Also it hath been adjudged, that neither the said clause of Magna Charta nor any other law, privileges a Peer from being indicted by a *Grand Jury of Commoners*, either in the King's Bench or before Commissioners of Oyer, or the Coroner, &c." In s. 13 it is said, "As to what crimes a Peer is to be tried by his Peers, I take it to be agreed that he has a right to be so tried upon an indictment of treason or felony, whether such treason or felony be made such by the common law, or by statute; and also upon an indictment for misprision of treason or felony; but it seems that, regularly, he is to be tried by the country for all other crimes out of Parliament, as Præmunire, Riot, &c."

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BEFORE LORD CHIEF JUSTICE TINDAL, MR. JUSTICE BOSANQUET, AND MR. JUSTICE WILLIAMS.

March 3rd.

REGINA v. P. M. S. WALLACE and M. S. S. WALLACE (a).

An accessory before the fact to a felony committed on the high seas within the jurisdiction of the Admiralty of England, may be indicted and tried at the Central Criminal Court, by virtue of the statutes 7 Geo. 4, c. 64, s. 9, and 4 & 5 Will. 4, c. 36, s. 22, although the person charged as the principal offender has not been "committed to or detained in" the gaol of Newgate for his offence.

A person may be tried under the statutes 7 Will. 4 and 1 Vict. c. 89, ss. 6 & 11, as an accessory be-

fore the fact to the offence of setting fire to a vessel, of which he was at the time a part owner.

An indictment is properly framed, which states that the principal felon cast away and destroyed a vessel, and that the accessory incited, moved, aided, counselled, hired, and commanded him to do it; and the accessory may be convicted on an indictment so framed, although the principal felon has not been tried, and does not appear to be amenable to justice.

THE first count of the indictment stated that Edmund Loose, late of London, mariner, with force and arms &c., a certain vessel called the Dryad, the property of Alexander Howden and others, on a certain voyage upon the high seas then being, then and there upon the high seas within the jurisdiction of the Admiralty of England, and within the jurisdiction of the Central Criminal Court, feloniously, unlawfully, and maliciously did cast away and destroy, with intent to prejudice the said Alexander Howden and another being part owners of the said vessel, against the form of the statute, &c. And further, that Patrick Maxwell Stewart Wallace, before the said felony was committed, in form aforesaid, at London aforesaid, and within the jurisdiction of the said Central Criminal Court, did feloniously and maliciously incite, move, aid, counsel, hire, and command the said Edmund Loose, the said felony, in manner and form aforesaid, to do and commit, against the statute, &c. Then followed a similar statement with reference to the other prisoner Michael

(a) The prisoners severed in their challenges, and were therefore tried separately: but as the arguments and decisions were the

same in both cases, it has been thought most convenient to report the two together.

Shaw Stewart Wallace, charging him also as an accessory before the fact.

The second count omitted the words which described the vessel as the property of Alexander Howden and others.

The third and fourth counts were similar to the first and second, except that they charged *the intent* to be "to prejudice Scoho Juan de Zulieta and others, the owners of certain goods then and there laden and being on board the said vessel."

The fifth and sixth counts charged *the intent* to be, "to prejudice John Irving, then and still being the chairman of a certain company called by the name of the Alliance Marine Assurance Company, which company had, before then, underwritten a certain policy on certain goods then being on board the said vessel, which said policy was then in full force and operation."

There were several other counts, stating the intent to be to prejudice the underwriters on other policies of insurance; some of them effected on goods; some on the vessel, and some upon freight.

From the evidence at the trial it appeared, that Alexander Howden and a person named Anstice, were the owners of one-fourth of the Dryad, and the prisoner Michael Shaw Stewart Wallace was the owner of the remaining three-fourths; that the goods which were sent on board by Zulieta & Company, who chartered the ship, were insured at Lloyd's, and an intent to prejudice the underwriters of the policy which insured them was alleged in one of the counts in the indictment. But there were also three different policies effected by the prisoners themselves on certain goods specified in the policies, but no part of those goods was put on board the vessel.

It was also proved that the Dryad was wilfully sunk by Loose, who was the captain, on the high seas near the island of St. Domingo; and (with the exception of a very

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trifling salvage) there was a total loss both of the ship and cargo. Loose had not been tried for his offence, and as far as the evidence went, it appeared that he was not amenable to justice.

J. Jervis, C. Phillips, Doane, and Ballantine, on the part of the prisoners, in the two cases, contended, *inter alia*, that the Court had not jurisdiction to try them. The argument was as follows:—The stat. 7 & 8 Geo. 4, c. 64, s. 9, which applies to the trial of accessories before the fact, provides, that, “if any person shall counsel, procure, or command any other person to commit any felony, whether the same shall be a felony at common law, or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding, shall be deemed guilty of felony, and may be *indicted and convicted*, either as an *accessory before the fact* to the principal felony, *together with the principal felon*, or may be indicted and convicted of a *substantive felony*, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as an accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offence of the person so counselling, procuring, or commanding, *howsoever indicted*, may be inquired of, *tried*, determined, and punished *by any Court which shall have jurisdiction* to try the *principal felon*, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas or at any place on land, whether within her Majesty’s dominions or without.” This is a jurisdiction which attaches *to the person of the felon* and *not* to the *offence*; or, in other words, any Court, having jurisdiction to try the principal felon, may try the accessories, just as if the offence had been committed where the principal felon was. The stat.

4 & 5 Will. 4, c. 36, s. 22, enacts, that it shall be lawful for the Judges of the Central Criminal Court "to inquire of, hear, and determine any offence or offences committed, or alleged to have been committed, on the high seas and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol of Newgate of any person or persons *committed to or detained therein*, for any offence or offences alleged to have been done and committed upon the high seas aforesaid, within the jurisdiction of the Admiralty of England." Therefore the jurisdiction of the Court depends, as in the case of bigamy and some other cases, on the fact of the party's being in custody within the jurisdiction of the Court. Here the Court might possibly try the offence of Loose, if he were a prisoner in the gaol of Newgate; but they have not the power, under the present circumstances, to try the prisoners as accessories to that offence, Loose not having been committed to or detained in prison by the Court for his offence, such offence having been committed upon the high seas.

The stat. 1 Vict. c. 89, s. 6, enacts, that "whosoever shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony," &c. The 11th section of the same statute enacts, that, "in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable," &c.

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The case of *Rex v. Easterby* (b) decided, that accessories before the fact, on shore, to the wilful destruction of a ship on the high seas, were not triable by the admiralty jurisdiction, under the stat. 11 Geo. 1, c. 29, s. 7. Further, the indictment in this case is not properly framed as an indictment for a substantive offence, within the meaning of the 7 Geo. 4, c. 64, s. 9, but is in form an indictment at common law, against the principal and the accessories before the fact; and as the principal felon has not been convicted, the accessories before the fact cannot be tried or convicted upon it.

Also, to give the Court authority to try the prisoners, it should appear, that the accessorial acts were committed either in London or those parts adjacent which are within its jurisdiction.

There is a still further question—whether the offence of destroying a ship, of which the party charged is a part owner, is within the act of Parliament. Under the stat. 9 Geo. 1, c. 22, it was held, that a man could not be punished for setting fire to his own house; and the stat. 7 & 8 Geo. 4, c. 30, s. 2, remedies that defect, by saying “whether the same shall then be in the possession of the offender or in the possession of any other person.”

TINDAL, C. J.—The words of the statute, on which the present indictment is framed, viz. “with intent to prejudice any owner, *or part owner*,” seem to be put in opposition. But if it becomes necessary, you may have the benefit of this objection with the rest.

It was also objected at the trial, that as the stat. 7 Will. 4, and 1 Vict. c. 89, s. 6, describes one felonious intent to be, to prejudice the persons who shall underwrite any policy of insurance upon any goods *on board* the vessel, no evidence was receivable with respect to the three policies

(b) Russ. C. C. R. p. 37; 2 Leach, C. C. 947.

on goods effected by the prisoners, because the goods mentioned in them were never put on board the Dryad.

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But this objection was overruled, and the evidence received. Both prisoners were found guilty of the whole charge in the indictment, and all the objections were reserved for the opinion of the fifteen Judges.

In the ensuing Easter Term, at a meeting of all the Judges, except Mr. Baron *Parke*, the case was called on. The Attorney-General said, that he was prepared, on the part of the Crown, to argue against the objections, but as no counsel appeared to support them on the part of the prisoners, he presumed it would not be necessary for him to say anything.

April 24th.

Lord DENMAN, C. J., said, that, as no counsel appeared on the part of the prisoners, it would not be necessary for the Attorney-General to be heard. The objections would of course, without argument, receive all the consideration to which they were entitled.

The prisoners were afterwards sentenced to be transported for life.

Sir *J. Campbell*, A. G., *Clarkson*, *Bodkin*, and *Laurie*, for the prosecution.

J. Jervis, and *Ballantine*, for the prisoner, Michael Wallace.

C. Phillips and *Doane*, for the prisoner, Patrick Wallace.

[Attornies—*Phillips*, and *W. C. Humphreys*.]

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APRIL SESSION, 1841.

BEFORE MR. BARON GURNEY.

April 8th.

A customer in the country had an account open with a wholesale house in London: a letter purporting to come from him was delivered at their place of business; it was in the following form:—"I shall feel obliged by your paying Mr. B. the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same. You will please have a receipt, and add the amount to invoice of order on hand." It appeared to be the practice of the house in London to pay to country customers on requests of a similar description.

The party who sent it by an innocent agent, and obtained the money on it, was indicted for forging and uttering it. The instrument was described in the indictment as an *undertaking*—

a *warrant*—and an *order*, each for the payment of 2*l.* 7*s.* 8*d.* The prisoner having been convicted of uttering, the fifteen Judges *held* the conviction wrong, being of opinion that the instrument was neither an undertaking, a warrant, or an order.

REGINA v. JOHN THORN.

THE first two counts of the indictment charged the prisoner with forging, and uttering, knowing it to be forged, an *undertaking* for the payment of 2*l.* 8*s.* 6*d.*, with intent to defraud James Lys Seager and others.

In other counts he was charged with forging and uttering the same paper, describing it as a *warrant* for the payment of money.

In other counts the instrument was described as an *order* for the payment of money.

From the evidence for the prosecution it appeared, that on the 24th of February the prisoner spoke to a ticket porter named Walker, and told him to go to Mr. Seager's, the distiller, with a letter and memorandum, which he gave him. He told him also that he was to receive 2*l.* 7*s.* 8*d.*, and bring it to Oliver's coffee-house, at the foot of Westminster Bridge. The ticket porter went to Seager's, shewed the letter and memorandum to Mr. Seager and his clerk, and told them how he obtained it. They gave him the 2*l.* 7*s.* 8*d.*, and the prisoner met him in New Palace Yard, and asked him if he was the porter he had sent. He replied "Yes," and gave the prisoner the money, and the prisoner gave him back a shilling of it for his trouble. He was then about to go away, when the ticket porter told him that he was his prisoner; and soon after Mr. Seager and a policeman came up, and the prisoner was taken into custody, and the money taken out of his hand.

The letter was as follows :—

“Taunton, 20th February, 1841.

“Sir,—I have received your letter respecting balance of your account, and beg to say, had any person called as expected, it would have been paid. I now return the case with this inclosed, and the amount being so small, I give you on other side an order from Messrs. Seager & Co., as per address, and if you will send this to them they will pay it for me. After deducting case I make balance 2*l.* 7*s.* 8*d.*, and for which please give a receipt.

“I am, Sir, your most obedient,

“T. D. CHAPPELL.”

“Mr. Bennett, Thames Street, London.”

The other paper was as follows :—

“Taunton, }
Fore Street, } 20 Feb. 1841.

“Gentlemen,—I shall feel obliged by your paying Mr. Bennett the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same. You will please have a receipt, and add the amount to invoice of order in hand.

“I am, Gentlemen,

“Your most obedient servant,

“T. D. CHAPPELL.”

“Messrs. Seager, Evans & Co., distillers, &c.,
10, Milbank, Westminster, London.”

It further appeared, that Messrs. Seager & Evans had a customer at Taunton named T. D. Chappell, and that on the 23rd of February, the day before the letter and memorandum were presented, they had sent two puncheons of gin for him to the wharf in their van. The name of Seager & Evans was on the van, and on each puncheon “T. D. Chappell, Taunton, Somerset;” and this address was so conspicuous, that a person standing in the street near the waggon could easily read it.

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Mr. Chappell proved that the letter was not sent by him, nor by his authority.

Mr. Seager, in his evidence, said,—“Our house has a customer, named Chappell, of Taunton; in February we had an account open with him; on the 24th of February I was present when Walker brought this paper; in consequence of information, I desired the money to be given to him and marked; I afterwards went out, and observed Walker go towards Oliver’s coffee-house; he was met by the prisoner; I saw them talking together; and soon after I went up, and had him taken into custody. *Supposing I believed this to have been the genuine writing of Mr. Chappell, I should have paid the money—that is our practice; it is in the course of business to pay on these requests to country customers.*”

C. Phillips, and Clarkson, for the prisoner, contended that this was not an offence within the act of Parliament (a), as the paper was neither an undertaking, nor a warrant, nor an order for the payment of money, but, at most, amounted only to a request; and forging a request for money was not provided for. In the course of the argument reference was made to *Ravencroft’s case* (b) and *Rex v. Raake* (c).

GURNEY, B., said, that he would reserve the point for the consideration of the Judges; and the jury, after his Lordship had summed up, found the prisoner

Guilty of uttering.

Bodkin, for the prosecution.

C. Phillips, and Clarkson, for the prisoner.

The Judges afterwards considered the question, and were of opinion that the conviction could not be sus-

(a) 1 Will. 4, c. 66.

(b) 2 Moo. & Rob. 161.

(c) 2 Moo. C. C. R. 66; 8 Carr. & Payne, 627.

tained, and the prisoner was ordered to be discharged, so far as this indictment was concerned. But he was subsequently tried for a fraud and convicted, and sentenced to imprisonment.

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MAY SESSION, 1841.

BEFORE MR. BARON PARKE.

REGINA v. MICHAEL SULLIVAN.

May 12th.

THE first count of the indictment charged the prisoner with maliciously and feloniously assaulting one George Fox, on the 12th of March, and cutting and wounding him on the forehead, with intent to murder him. The second count charged the intent to be to maim and disable him; and the third, to do him some grievous bodily harm.

It appeared, from the evidence on the part of the prosecution, that Fox, the prosecutor, was a porter and an occasional assistant to a Mr. West, a broker. On the 12th March West and Fox, with two other men, one named Thompson and the other Barnes, went to a room on the ground-floor of a house in Cooper's Court, Rosemary Lane, and made a distress for rent on the goods of the prisoner, who lodged in that room. The prisoner was not present at the time of the distress, but some women were there, one of whom was the prisoner's wife. After the inventory had been made out, Thompson was left in the room, as the man in possession, and the others went into another part of the house, and, on hearing a noise in the prisoner's room, they went down and found Thompson on the outside of the room door. Fox asked him who had turned him out, but, before he could answer, West, the broker,

A broker and his men having levied a distress for rent, the man left in possession was ejected. The owner of the goods was not in the room at the time of the levy, and it was not proved that he was a party to the turning out of the man, or that he knew of the distress being levied; but on the broker and his assistants breaking open the outer door to re-enter, the prisoner struck one of the assistants with an axe on the forehead:—*Held*, that under these circumstances the prisoner must at least be found guilty of an assault; and also that, although he might be found he could not be

guilty of wounding with intent to murder, or to do grievous bodily harm, yet found guilty of wounding with intent to maim and disable.

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called out loud enough for the people in the room to hear,—"Break the door open, and go in and take possession again." Fox then asked the persons inside to open the door, upon which the prisoner said, that he would split open the head of the first person who opened the door. The door was then forced open, and, as Fox was entering the room, the prisoner, who had an axe in his hand, struck him on the head with the edge of it, and inflicted a cut of about a quarter of an inch, and a graze of about half an inch on the forehead; the axe had cut through the skin and flesh, but very little below the surface of the skin. The medical witness who proved the fact said, on cross-examination—"It was more of a graze than a wound; it merely raised the skin, at the top of which was a slight cut. I put a strap on it, and he walked away."

There was no evidence to shew that the prisoner was one of the persons who pushed Thompson out of the room, nor was he told individually that there had been a distress for rent.

West was examined as a witness, and said—"I am a broker, and was authorized to distrain for rent, at No. 2, Cooper's Court—the prisoner was not present when I made the levy in his room—I did not see the prisoner till after this occurred, and had not told him I had made the levy. His wife was present when I made the inventory—there were hundreds of people round the house—he must have known I had distrained for his rent. After the blow was struck, he said the tax-gatherer had desired him, if any person came there, to eject them, as he could get no taxes from the landlord—he desired him to pay no rent. *I cannot say he knew, before the blow was struck, that I had distrained for rent.*"

PARKE, B., in summing up the case to the jury (*inter alia*), observed.—You will have to say, in the first place, whether you are satisfied that there was a wound, and then, if there was, whether it was inflicted with any of the

intents mentioned in the indictment. The surgeon's evidence on the first point is, that there was a wound, and barely a wound. There is no proof of an intent to maim and disable, as the blow was aimed at the head of the prosecutor; it would have been otherwise, if it had been aimed at his arm to prevent his being able to use it. The question therefore will be, whether there was a wounding with intent either to murder the prosecutor or to do him some grievous bodily harm. If you should be of opinion either that there was not a wound, or that it was not inflicted with either of those intents, then you will have to say, whether an assault has or has not been committed; and that will depend upon this question, whether the prosecutor and his party were trespassers or not. It is somewhat doubtful whether the prisoner really knew that his goods had been distrained for rent; but it seems, from the evidence, that he must have had some suspicion of that fact, as he said afterwards that the tax-gatherer had desired him, if any persons came there, to eject them. Though by law parties have not any right to break an outer door in order to levy a distress, yet, if they are turned out, they have a right to re-enter by breaking the door. If a man finds another breaking into his house, he has a right to push him out, and to use as much force as is necessary for that purpose; but he has no right to use such a weapon as that which was used by the prisoner in this case. I cannot present the case to you as a case of less than an assault—it will be for you to say whether it is more.

Verdict—Guilty of assault. Sentence, nine months' imprisonment.

Heaton, for the prosecution.

C. Phillips, for the prisoner.

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JUNE SESSION, 1841.

BEFORE LORD CHIEF JUSTICE TINDAL.

June 17th.

REGINA v. M'PHANE, POPHAM, and DONOGHUE.

Where three persons were indicted jointly for cutting and wounding, and the third of them did not come up to the spot until after one of the first two had got away, and then kicked the prosecutor while he was on the ground struggling with the other,—it was held, that the two, who jointly assaulted the prosecutor and wounded him at first, might be found guilty either of the felony or of an assault only, but that the third prisoner must under the circumstances be acquitted altogether.

THE first count of the indictment charged the prisoners jointly with feloniously assaulting George Whatmow, and cutting and wounding him with intent to kill and murder him.

In the second count the intent was charged to be to maim and disable him; and in the third count to do him some grievous bodily harm.

The prosecutor was a police constable; and while he was on duty in Hooper-street, Lambeth, between eleven and twelve o'clock at night, on the 17th of May, he was proceeding in a direction towards a beer shop called "the Farm House," when he was told that a person had been robbed of his watch there. He went on towards the house for the purpose of making inquiries, and when he was about ten yards from the door the prisoner Popham came from a brothel opposite, and, saying—"You shall never reach the house," struck him a violent blow in the face with his fist. Popham then was making his way towards the beer shop, when the prosecutor seized him and endeavoured to stop him; upon which he took a life-preserver out of his breast pocket and struck him with it, and knocked off his hat. He then struck him a second blow with the life-preserver, which severely cut his head about the left temple, and felled him to the ground, but he still continued to keep his hold; and while they were struggling together the prisoner M'Phane came from the beer-shop, and struck the prosecutor another blow on the face with some instrument, which appeared to him to be a life-

preserver also. The prosecutor still retained his hold of Popham, but M'Phane gave him another blow across the arm with the same weapon, which caused him to lose his hold of Popham, and Popham in consequence got away. M'Phane then struck the prosecutor a third blow, upon which he endeavoured to secure him; and while he was so doing, the other prisoner Donoghue came from the beer-shop and kicked him several times in various parts of the body while he was on the ground, but did not say anything while he was doing so.

Several witnesses were called, on the part of M'Phane, to contradict the witnesses for the prosecution.

TINDAL, C. J., in his summing up, told the jury, that inasmuch as the prisoners were jointly charged with the offence of cutting and wounding, and as it appeared that the prisoner Donoghue did not come up until after the prisoner Popham had got away, the evidence did not sustain the charge against him; and he must be acquitted altogether upon this indictment. With respect to the other two prisoners, he thought that the first count of the indictment had not been proved, as it did not appear that there was any intention to take away the life of the prosecutor. They would therefore have to say, whether they considered that the prisoners, Popham and M'Phane, wounded him with intent either to maim and disable him, or to do him some grievous bodily harm; if they did so consider, then, they would find them guilty upon either the second or third counts; but if they were not satisfied that they had either of those intents, but still were of opinion that they struck the prosecutor in the way described by the evidence, they were at liberty to find them guilty of an assault only.

Verdict—Popham and M'Phane, guilty
upon the second count; Donoghue,
not guilty.

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Clarkson, for the prosecution.

Payne, for the prisoner Popham.

Horry, for the prisoner Donoghue.

Charnock, for the prisoner M'Phane.

AUGUST SESSION, 1841.

BEFORE MR. JUSTICE COLERIDGE.

Aug. 26th.

REGINA v. JEREMIAH DRISCOLL.

If one man strikes another a blow, that other has a right to defend himself and to strike a blow, *in his defence*, but he has no right to *revenge himself*; and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and battery.

THE prisoner was indicted for unlawfully, maliciously, and feloniously assaulting John Sullivan, on the 15th of August, and wounding him in and upon the left side of the neck and left cheek, with intent to do him some grievous bodily harm.

It appeared that the prosecutor and the prisoner had some dispute, in the course of which the prisoner called the prosecutor a liar; whereupon the prosecutor clenched his fist and was about to strike him, but the prisoner's wife interposed, and pushed him down, and the prisoner inflicted on him the injury stated in the indictment.

COLERIDGE, J., in summing up, said—If one man strikes another a blow, that other has a right to defend himself, and to strike a blow in his defence, but he has no right to revenge himself: and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and a battery. It is a common error to suppose, that one person has a right to strike another who has struck him, in order to revenge himself, and it very often influences people's minds; and I have, therefore,

thought it right to state what the law upon the subject really is.

Verdict—Guilty ; sentence, transportation for fifteen years.

Doane, for the prisoner.

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REGINA v. TUCKWELL and PERKINS.

Aug. 28th.

THE prisoner *Tuckwell* was indicted for stealing, on the 15th of August, thirty sovereigns, ten half-sovereigns, eighty halfcrowns, 300 shillings, thirty sixpences, fourteen groats, and one £5 bank note, the monies of Henry Leighton Mayo Hawthorn, in his dwelling-house, and the prisoner *Perkins* was charged with inciting him to commit the felony.

From the evidence on the part of the prosecution, it appeared that the prisoner *Tuckwell* had been town traveller to the prosecutor, and had left him about six weeks ; and the prisoner *Perkins* continued in his employ up to the time of the robbery, which took place on Sunday the 15th of August. *Tuckwell* was let in by *Perkins*, on the afternoon of Saturday the 14th, and remained in the prosecutor's house all night. *Perkins* left the house on Sunday morning about 11 o'clock, and did not return till the evening ; and during his absence it was that *Tuckwell*, in pursuance of the arrangement between them, stole the prosecutor's money out of his cash-box.

A servant let a person into his master's house on a Saturday afternoon, and concealed him there all night, in order that he might rob the house ; and on the Sunday morning left the premises in pursuance of the previous arrangement. The man in the servant's absence broke into the bedroom of the master and stole the contents of his cash-box :—*Held*, that the man who took the property from the cash-box was rightly charged as a thief, and the servant who let him into the house as an accessory before the fact.

Montagu Chambers, for the prisoner *Perkins*, contended, that he was wrongly charged as an accessory before the fact, and ought to have been charged as a thief, if the evidence was correct. He contended that, according to the principles of law, if one person puts another into a condition to commit a particular offence, he is constructively present at its commission. He referred, in support of his

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argument, to Foster's Crown Law, p. 351, and the case of *Regina v. Jordan and Sullivan* (a).

COLERIDGE, J.—I think there is nothing in the objection. I agree with the doctrine laid down by Mr. Justice *Foster*, and I also agree with the decision in *Jordan and Sullivan's* case. But that case differs from the present. There the party took a part in the crime charged; but here the crime was not commenced when Perkins left the premises, and did not commence till the other prisoner went into the room and broke the cash-box open.

In the case of *Jordan and Sullivan*, there was a charge of breaking and entering; and those who assisted in the breaking were considered as parties engaged in the commission of the offence, and therefore responsible for what occurred afterwards.

The jury found both prisoners guilty.

Payne, for the prosecution.

Montagu Chambers, for the prisoner Perkins.

C. Chadwicke Jones, for the prisoner Tuckwell.

[Attornies—*Walters & Reeve*, and ———.]

(a) 7 Carr. & Payne, p. 342. In that case a room door was latched, and one person lifted the latch and entered the room and concealed himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were with him at the time he lifted the latch, for the purpose of assisting him to enter, and

screened him from observation by opening an umbrella. And it was held that the two, being in law parties to the breaking and entering, were answerable for the robbery which took place afterwards, though they were not near the spot at the time when it was perpetrated.

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REGINA v. JOSEPH LYONS and ROSETTA LYONS.

Aug. 28th.

THE prisoners were indicted for feloniously receiving of a certain evil-disposed person, on the 3rd of August, 3lbs. weight of brass, value 1s. 6d., of the goods of John Womerton, well knowing the same to have been stolen.

It appeared that a brass weight had been stolen by a lad in the employ of the prosecutors; and, it having been taken from him by another servant in the presence of one of the prosecutors, it was restored to the lad again, in order that he might take it for sale to the house of the prisoner, where it seemed he had been in the habit of selling similar articles before. The lad took it and sold it for 10½d.

A lad stole a brass weight from his master, and, after it had been taken from him in his master's presence, it was restored to him again, with his master's consent, in order that he might sell it to a man to whom he had been in the habit of selling similar articles, which he had stolen before. The lad did sell it to the man; and the man being indicted for receiving it of an evil-disposed person, well knowing it to have been stolen, was convicted and sentenced to be transported for seven years.

Doane, for the prisoners, objected that, at the time when the brass was sold by the lad at the shop, it could not be considered as stolen property, it having been restored to the possession of the owner, and by him given to the lad to enable him to sell it in order to detect the prisoners. He contended, that any such restoration, for however short a time, was sufficient to prevent its being treated afterwards as stolen property; because it was in law in the possession of the master.

COLERIDGE, J., said, that for the purposes of the day he should consider the evidence as sufficient in point of law to sustain the indictment, but would take a note of the objection. His Lordship left the case to the jury, who found

Joseph Lyons, Guilty; and Rosetta Lyons,
Not guilty.

C. Phillips, for the prosecution.

Doane, for the prisoners.

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Though his Lordship took a note of the objection at the time, yet he afterwards sentenced the prisoner, who was convicted, to seven years' transportation; the matter also was subsequently called to his Lordship's attention by the prisoner's counsel, yet no alteration was made in the judgment of the Court; from which it is to be inferred that, upon consideration, his Lordship did not think that in point of law the objection ought to prevail.

SEPTEMBER SESSION, 1841.

BEFORE MR. JUSTICE MAULE AND MR. BARON ROLFE.

Sept. 25th:

REGINA v. JOHN JOHNSON and EDWARD JONES.

A servant pretended to concur with two persons, who proposed to him to unite with them in robbing his master's house. The master being out of town, the servant communicated with the police, and acted under their instructions. In consequence of this, a little after 9 o'clock, one evening, he let in one of the persons by lifting the latch, but before that person had taken any property he was seized by the police, and, a

THE prisoners were indicted for burglariously breaking and entering the dwelling-house of Joseph Drake, about ten in the night of the 29th of August, and stealing therein eighteen spoons, value 9*l.* 15*s.*; one pair of sugar-tongs, value 10*s.*; and one basket, value 6*d.*, of the goods of the said Joseph Drake.

It appeared that a lad named Cole, who was groom to Mr. Drake the prosecutor, met with the prisoner Jones on Thursday the 26th of August, and they entered into conversation about the badness of trade, and Jones said that he would not blame anybody who would rob another in these hard times, and asked the lad where his master kept his plate, and being told said, that if he would let him into the house he would give him £500. They made an appointment to meet again on Saturday the 28th. The lad, almost immediately, told a policeman what had

crowbar being found upon him, was immediately placed in confinement. After this the servant went out again and fetched the second person, and let him in in the same manner. This person was seized with a basket of plate in his hand, which he had carried from the kitchen part of the way up-stairs:—*Held*, that neither of the persons could be convicted of burglary; but that the one who was seized with the plate might be convicted of stealing in a dwelling-house, and also that the other might be indicted as an accessory before the fact to such stealing.

passed, and his master being out of town agreed to act under the directions of the police, in order to detect the prisoner Jones. He accordingly met him on the Saturday, and arranged to meet him again on the Sunday, when they met with the other prisoner Johnson; and it was arranged that Cole should get the other servants out of the way and admit the two prisoners to the house on the Sunday evening. In the mean time several policemen were secreted in the prosecutor's house. The lad Cole, about a quarter past nine in the evening, went and fetched the prisoner Johnson to the house. Cole then lifted the latch of the stable-yard door and a little gate, and also the kitchen door, and let Johnson in, and followed him into the back kitchen. Johnson then went up stairs, and, as he was about to open the door of the room in which the prosecutor's iron chest was deposited, the police seized him before he had done anything, and locked him up in one of the rooms of the house. A few minutes after he had been so locked up, Cole, who had been out to fetch the other prisoner Johnson, brought him to the house and let him in in the same way as he had let in Jones, viz. by opening the door for him. Jones went into the back kitchen, and took from it the plate-basket containing the articles of plate mentioned in the indictment.

MAULE, J., in summing up (ROLFE, B., being present), said—It appears to me that on the present occasion, according to the evidence, there was no such breaking as to constitute the crime of burglary. Cole, the groom, it is true, appeared to concur with the prisoners in the commission of the offence. But in fact he did not really concur with them, and he acting under the directions of the police must be taken to have been acting under the directions of Mr. Drake the prosecutor. Under the circumstances of this case the prisoners went in at a door which, as it seems to me, was lawfully open. Therefore neither of them was guilty of burglary. And the prisoner John-

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son, if not guilty of burglary, was not guilty of anything that is charged in the indictment, because he was in custody at the time when the plate was taken.

Verdict—Jones, guilty of stealing in a dwelling-house goods above the value of £5; Johnson, not guilty (*a*).

Clarkson, for the prosecution.

Payne, for the prisoners.

(*a*) Johnson was detained to be indicted as an accessory before the fact to the offence of which Jones was found guilty, and was tried and convicted before Mr. Baron Gurney at the following sessions.

OCTOBER SESSION, 1841.

BEFORE MR. BARON GURNEY.

Oct. 29th.

REGINA v. JOHN ODELL RATHBONE.

Suspicion being entertained against a letter-carrier in the employ of the General Post-Office, an assistant inspector wrote a letter, and, having inclosed in it a marked sovereign, sealed the letter, and took an opportunity, while the carrier's back was turned, to place it among a number of letters which he was engaged in sorting. The marked sovereign was afterwards found in the letter-carrier's pocket. The sovereign was one of those which are occasionally found on the floor of the post-office, having dropped out of letters, and which are carried to a fund, which is under the direction of the Postmaster General. The letter-carrier being indicted for stealing a *post letter* containing a sovereign, and also for stealing a sovereign the property of the Postmaster-General, it was *held*, that he could not be convicted, under the circumstances, of the more serious offence of stealing a *post letter* containing money; but might be convicted of the simple larceny of the sovereign.

THE first count of the indictment stated that the prisoner, being employed under the post-office of Great Britain and Ireland, feloniously did steal, on the 15th of October, a certain post letter directed and addressed—"Mr. D. M'Gowan, 16, Windmill-street, Haymarket, London," containing one sovereign, the said letter and money being the property, goods, chattels, and money of her Majesty's Postmaster-General, contrary to the statute &c. (*a*).

(*a*) 1 Vict. c. 31, s. 26. That section enacts, "that every person employed under the post-office, who shall steal, or shall for any purpose whatsoever, embezzle, secrete, or destroy, a *post letter*, shall in Eng-

In the second count he was charged with *embezzling* the letter and money.

In the third count he was charged with *secreted* a post letter, &c.

In the fourth count, with destroying a post letter.

In the fifth count, with stealing from and out of a post letter.

And in the last count, with stealing a sovereign the property of her Majesty's Postmaster-General.

The prisoner was a letter-carrier in the employ of the General Post-Office, and assisted in delivering letters in the Golden Square district, in which district the street to which the letter was addressed is situated. Suspicions were entertained that he did not duly deliver the letters entrusted to him, and the following plan was adopted to discover whether he did or not. One of the assistant inspectors of the letter-carriers, on the 14th of October, enclosed a marked sovereign in a letter addressed to Mr. McGowan in Great Windmill-street. He sealed the letter, and marked it as if it had been put into the post in the regular way as a paid letter; and on the following morning, while the letters were being sorted at the office in Golden Square, where the prisoner was employed, an opportunity was taken of his momentary absence to place it in a heap of letters which he was about to sort, and which he had to deliver that day. He was afterwards seen to

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land and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the Court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years, and if any such *post letter*, so stolen or embezzled, secreted or destroyed, *shall contain* therein any chattel, or money whatsoever, or any valuable security, every such offender shall

be transported beyond the seas for life."

Sect. 27, of the same statute, enacts, "that every person who shall steal, *from or out of a post letter*, any chattel, or money, or valuable security, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life."

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return to his seat and take the letter into his possession. The letter was not delivered among the rest by the prisoner, whose duty it was to deliver it; and in the course of the same day the prisoner was questioned upon the subject, given into custody, and searched, and the marked sovereign was found in his pocket.

It appeared that the sovereign was one of those which are occasionally found on the floor of the General Post-Office, having dropped out of letters; they are collected and deposited with one of the officers of the post-office, and form a fund which is carried to the credit of the public, under the direction of the Postmaster-General.

Clarkson, for the prisoner, contended that, as the letter containing the sovereign had not been regularly put into the post office for the purpose of being transmitted by the post, but having, on the contrary, been placed in the heap of letters which were about to be sorted, for the purpose of trying the honesty of the prisoner, it could not be considered as a post letter. He also contended that the prisoner could not be convicted of larceny, because the sovereign could not, under the circumstances of the case, be treated as the property of the Postmaster-General, whose property alone it was stated to be in all the counts of the indictment.

GURNEY, B., was of opinion that the latter objection was not sustainable, but that the first was a fit objection to be reserved for the opinion of the fifteen Judges: and as the Attorney-General for the prosecution did not object to both points being submitted to the Judges, his Lordship assented to that course.

Sir F. Pollock, A. G., *Shepherd*, *Bullock*, and R. Gurney, for the prosecution.

Clarkson, for the prisoner.

[Attornies—*Peacocks*, and ———.]

In the ensuing session Mr. Baron PARKE delivered the judgment of the Court as follows:—

John Odell Rathbone: You were tried at the last session of the Central Criminal Court, upon an indictment which charged, that you, being a person employed under the post-office, did steal a certain post letter, addressed and directed to a person named M'Gowan, living in Windmill-street; which letter contained one sovereign. There was also a count in the indictment, charging you with stealing a sovereign, the property of her Majesty's Postmaster-General. Upon some doubts suggested on your trial by the learned counsel on your behalf, the case was reserved for the opinion of the Judges; and the Judges have taken the case into their consideration.

It appeared, by the evidence, that you were employed as a letter-carrier by the General Post-Office, and that Windmill-street was in your district. On some suspicion attaching to you, a marked sovereign was put into a letter—not a letter put in the ordinary way into the post-office, but among other letters distributed to you to be carried out.

The objection was, that it was not a "post letter," or a letter put into the post; and the Judges are unanimously of opinion that that objection must prevail, the statute only applying to letters put into the post in the ordinary way.

But there was another count in the indictment, charging you with a simple larceny; that is, with stealing a sovereign, the property of her Majesty's Postmaster-General. That sovereign you certainly stole; for that sovereign, the marked sovereign, was found in your possession. It appears that it was a sovereign which had accidentally fallen out of a letter in the post-office; and such a sovereign must be considered, in point of law, as the property of the Postmaster-General, all the persons in the office being his servants. And we are all of opinion that the sovereign is correctly described in the indictment, as the sovereign of

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the Postmaster-General—it was his sovereign against all the world, except the owner of it. The Judges, therefore, are of opinion that you were properly convicted of the simple larceny, in stealing this sovereign; and, looking at all the circumstances of the case, the Judge who tried you is of opinion that the justice of the case will not be answered unless we pronounce upon you as severe a sentence as the law permits, considering that you are, in a moral point of view, guilty of the offence as much as if you had stolen a post letter. The sentence, therefore, is, that you be transported for seven years.

October 29th.

REGINA v. DAVID HENRY GILCHRIST.

A person was indicted for stealing four warrants and orders for the payment of money. In one count they were called "warrants and orders for the payment of money" merely; in another, "warrants and orders for the payment of money, commonly called post-office money orders;" and in a third count, they were described as "four valuable securities, that is to say, four warrants and orders for the payment of money, commonly called post-office money orders." They purported to be signed by the postmaster of Shrewsbury, and were addressed "*To the Post-Office, London.*" The form of the body of them was, "Credit the person named in my letter of advice the sum of £5, and debit the same to this office:"—*Held*, that the instruments were both warrants and orders for the payment of money: and also that it was not necessary to consider, whether they were in such a form as to require a stamp under the general Stamp Act; because it was the practice of the post-office to issue them unstamped, and that practice was sanctioned and legalised by the statute 3 & 4 Vict. c. 96.

THE first count of the indictment charged the prisoner with stealing, on the 20th of September, at the parish of St. Ann and Agnes, four warrants and orders for the payment of money; to wit, for £5 each, and of the value of £5 each, the property of Edward Williams. The second count described the papers as four warrants and orders for the payment, and of the value, of £5 each, commonly called post-office money orders, and stated them to be the property of Joseph Baker. The third count, charged the prisoner with stealing four valuable securities, that is to say, four warrants and orders, commonly called post-office money orders, and described them as the property of her Majesty's Postmaster-General.

Joseph Baker was called as a witness for the prosecution. He said:—"I am a corporal in the 56th regiment of foot.

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On the 17th of September, I was quartered at the Ship public-house, in Charles-street, Westminster. I have known the prisoner about five weeks. On the 17th of September, he wrote a letter for me, for the purpose of my father-in-law sending me £20 to get my discharge; after he had written it, he read it over; it appeared to be the letter I had directed him to write; he did not read this postscript over to me:—‘I have changed my place of residence to Mr. Rutt’s eating-house, Charles-street, Westminster; so please direct, Mr. Baker, at Mr. Rutt’s eating-house, Charles-street, Westminster.’ He had written eight or nine letters for me before, and the answers were always directed, ‘Corporal Baker, Ship, Charles-street, Westminster.’ I expected an answer to this letter on Monday; he wrote it on Friday; no answer came for me to the Ship. On the 23d of September, I went to the place where the prisoner generally lodged, at the Essex Serpent, Charles-street. I found he had left there; they had not seen him since Monday. I then went to the General Post-Office, and inquired if any money orders had been brought in the name of Baker, and found four orders there. I never authorized the prisoner to receive the orders for me.”

Eliza Baker said,—“I am the last witness’s wife. In September last, I was staying with my father, Edward Williams, at Shrewsbury. I received the letter produced while I was there; and, in consequence of it, I sent to my husband four post-office orders for £5 each; the orders now produced are those I sent; I sent them to the address mentioned in that letter on Saturday morning, the 18th of September. I got them from the post-office at Shrewsbury, by paying the money there. I put the letter into the post-office about half-past one o’clock on the Saturday. I signed my husband’s name on the orders, because I knew he could not write.” Mrs. Baker afterwards said,—“I paid the £20 at the post-office at Shrewsbury, and the postmaster gave me these orders. He wrote them while I

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stopped there; he was inside his office; I could not see what he did."

It appeared, from the testimony of other witnesses, that the prisoner obtained the letter, containing the orders, from the landlady of Rutt's coffee-house, on the Monday, the 20th of September; and, on the same day, they were paid to some person, representing himself to be Baker, by a clerk in the money order office, at the General Post-Office. On the subject of the payment, this clerk said,—
 "On the 20th of September, I received this letter of advice, now produced, from Shrewsbury post-office; in pursuance of that letter, I paid these four orders of £5 each; I should not know the person to whom I paid them." He afterwards said, that, in paying money orders, he always trusted to the letter of advice. The signature to the orders and that to the letter of advice did not appear to be in the same hand-writing; and some of the witnesses differed in opinion as to which was the actual signature of the postmaster himself. No person was called as a witness who had ever seen the postmaster of Shrewsbury write; but several witnesses said, they had been in the habit of acting upon such signatures as those to the documents produced, in the payment of money orders.

The form of the orders was as follows :—

"In cases where personal attendance is inconvenient, if the receipt below is properly signed by the person to whom the order is made payable, and the party presenting the order for payment can afford full information as to the Christian name, surname, address, and occupation of the person who originally obtained the order, payment will be made to the party presenting the order; but, unless these conditions are strictly complied with, it will be refused."

"*Post-office, Shrewsbury, Sept. 18, 1841.*

"No. 1181.—£5.

"Credit the person named in my letter of advice the sum of Five pounds, and debit the same to this office.

"To the Post-Office,
 London."

"JOHN W. TOWERS,
 "Postmaster."

"The Christian and surname of the party to whom the order is made payable, must be written here at full length.

"Received the above. (Signature) JOSEPH BAKER."

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The letter of advice which related to the orders in question, was as follows:—

"Advice of Money Orders drawn by the Post-Office of Shrewsbury upon the Post-Office at London, on the 18th of Sept. 1841.

No. of Order.	Name of Person to whom payable.		Amount of Money			In these Columns must be stated the Name, Address, and Occupation or Calling of the Party paying in the Money, and obtaining the Order.			
	Christian Name.	Sur-Name.	Order.			Christian Name.	Sur-Name.	Address.	Occupation or calling.
1181	Joseph	Baker	£.	s.	d.	Edward	Williams	Mardol . . .	Surgeon.
1182	Joseph	Baker	5	0	0				
1183	Joseph	Baker	5	0	0				
1184	Joseph	Baker	5	0	0				
1188	M. A.	Ferrer	3	5	0	Mary	Williams	Abbey Foregate	Lady.
1192	John	Jones	2	0	0	David	Jones .	Howard Street .	Grocer.

J. W. TOWERS, { Postmaster who draws
the order.

{ Postmaster upon whom
the order is drawn.

"This advice must be signed, both by the postmaster who draws the order and by the postmaster upon whom it is drawn, and the latter must not fail, after having entered the particulars in his money order book, to forward it, by the very first post after its receipt, to the chief money order office of the kingdom, in which is situated the town where such order was granted, viz. to London, if the order is granted in England, to Dublin, if granted in Ireland, and to Edinburgh, if granted in Scotland, in obedience to the printed instructions on the subject. If any correspondence arises from neglect in forwarding this letter of advice according to these regulations, the postmaster guilty of

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such omission will be charged with the postage; and, in the event of further irregularity, he will be reported to the Postmaster-General."

* * "A duplicate advice for each order must invariably be forwarded to the capital of the country, or the post town of which the order is issued."

Clarkson, for the prisoner.—The letter of credit, without something else, would be of no use to any one: it is not negotiable, and it neither orders nor warrants the payment of money. The words are,—“Credit the person named in my letter of advice the sum of five pounds, and debit the same to this office;” and it is signed, “J. W. Towers, postmaster,” and addressed to the Post-Office, London; and although it may be the course of office to pay to other persons, I submit that the instrument itself is no warrant or authority to do so. The instrument on which the authority arises may or may not be within the Act of Parliament, but that instrument never came into the possession of the prisoner. There is no provision for the larceny of any request for the payment of money, but only of a request for the delivery of goods. The double allegation in the first two counts, that the prisoner stole “four warrants *and* orders” renders each of those counts bad. But if I am wrong in that position, and they should elect to rely upon one description only, yet I contend that the instrument itself does not come under the description of either a warrant or an order.

Shepherd, for the Crown.—The doctrine as to electing only applies to different transactions; but here it is one transaction, and whichever description does not apply may be rejected as surplusage. As to the objection, that the instrument is not an order, but only a letter of credit; the word credit is explained by the rest of the document. The word order is used in various parts, as, for instance, “The Christian and surname of the party to whom *the*

order is made payable, &c.;" and although the word credit is used, yet, on the whole, it is evidently meant for an order.

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R. Gurney, on the same side.—It is said that the first two counts are bad for duplicity; but it is every day's practice to use such descriptions. A party is often charged with cutting and wounding, and so a thing may be described as a warrant and order. There was a case before Mr. Justice *Littledale*, where there were two counts for shooting two different persons, and it was held, that the prosecutor could not be called on to elect, because it was all one transaction.

Clarkson, in reply.—That case decides the proposition in my favour, as there was not a statement in the same Court of shooting at A. and B. both, but in one of shooting at A., and in another of shooting at B. The offence charged here is not stealing an order and stealing a warrant, but stealing both a warrant and an order, and all in one count. If the first two counts are bad on this ground, then, the third will not be available, for the instruments are clearly not valuable securities, nor are they the property, as laid in that count, of the Postmaster-General.

GURNEY, B.—I do not think it very material to call upon the counsel for the prosecution to elect, for I have no doubt about this being a warrant for the payment of money, and I am strongly inclined to think that it is an order; and I have no doubt that, either as the one or the other, it is a valuable security.

Clarkson then addressed the jury for the prisoner, and

GURNEY, B., having summed up the case, the prisoner was found guilty.

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Sir *F. Pollock*, A. G., *Shepherd*, *Bullock*, and *R. Gurney*,
 for the prosecution.

Clarkson, for the prisoner.

[Attornies—*Peacocks*, and ———].

The case was reserved for the opinion of the fifteen Judges, and in Michaelmas Term it was argued by *Adolphus* for the Crown, and by *Clarkson* for the prisoner (*a*).

On the 4th December in the ensuing Session, *PARKE*, B., pronounced the judgment of the Court as follows:—

“ David Henry Gilchrist, you were tried at the last Session of the Central Criminal Court, upon an indictment containing several counts. One of those counts charged you with stealing four valuable securities, that is to say, four warrants, and orders for the payment of the sum of £5 each, commonly called ‘post-office money orders,’ then and there sent by the post, and which orders respectively were the goods, chattels, and property of Her Majesty’s Postmaster-General. There was another count, which charged that you stole four of these warrants and orders, the goods, chattels, and property of Joseph Baker. On your trial the facts proved to be these:—A person of the name of Baker, a corporal in the army, being desirous of obtaining his discharge from the army, got you to write a letter for him to his father-in-law, who was living at Shrewsbury, in order to obtain from him the sum of £20, to purchase his discharge from his regiment with that sum. Baker, it appeared, could not write, and he employed you to write the letter. You accordingly wrote it, and in it you desired that the money might be sent, not to the place where Baker resided, but to another place, where it appeared you afterwards went to receive the letter containing what was said to be an order, and appropriated it to your

(*a*) The substance of the argument is so clearly stated in the judgment of the learned Judge,

that it has not been thought necessary to insert it here.

own use. Therefore, there is no doubt that you stole whatever the letter contained that was sent from Shrewsbury.

But these objections were taken, that what was contained in that letter was not a money order.

It appears to be the practice of the post-office, when a person wishes to remit money from one place to another, that the postmaster of the place receives the sum of money to be sent, and then sends a letter of advice to the post-office, where the money is to be received, containing an account of all the sums drawn by the office at the place, payable at another place on a certain day. And he puts into that letter of advice the name of the person who is to receive the money. On this occasion the name of Joseph Baker, he being the person intended to receive the money, was inserted in the letter of advice of the four several sums of £5 each. The person who paid it in at the post-office at Shrewsbury, received what is contended to be the money order, which is in these terms:—

“Post-Office, Shrewsbury, September 18, 1841.

“Credit the person named in my letter of advice the sum of five pounds, and debit the same to this office,” purporting to be signed by the postmaster at Shrewsbury, addressed “To the Post-Office, London,” and under it is a receipt, which the person receiving the money from the post-office is to sign.

Now it being clearly established that you had stolen this piece of paper, said to be an order, the first objection made upon the trial and afterwards argued before the Judges, was, that this was not an order for the payment of money. The Judges are, however, unanimously of opinion, that this is an order for the payment of money. The objection was, that it was an order by the postmaster, but was not drawn on any one. But the Judges are of opinion, that the designation or address of this order is sufficient authority to the persons who carry on business at the post-office in London, and therefore that objection cannot prevail.

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It was also objected, that, if this instrument was a money order, it was an instrument requiring a stamp. Upon that question the Judges did not consider it necessary to decide. The answer to that objection was, that, although this was a money order, it was not a money order within the meaning of the Stamp Act, but a bill of exchange for the payment of money within the meaning of the Stamp Act; for no stamp is imposed except upon bills of exchange or orders for the payment of money payable to the person named in the order or bearer (which was not the case here, for it was payable to a person named in another document), or except delivered to the payee, or some person on his behalf. Some of the Judges were of opinion that this instrument could not be considered as delivered to the payee or any person on his behalf, because it was delivered to the father-in-law of Baker at Shrewsbury, who advanced the money, and who had it in his power to send this post-office order or not, as he pleased, by letter. However, the Judges are of opinion that it is unnecessary to decide that point; but this being the usage of the post-office, they were of opinion that it was sanctioned and legalized by the statute 3 & 4 Vic. c. 96, which statute provides, that the mode of remitting money orders which then prevailed should have continuance so long as the Commissioners of the Treasury should think fit. They were of opinion that that statute sanctioned and legalized the prevailing practice, and that this was a good money order notwithstanding the want of a stamp.

The learned Counsel for you before the Judges urged some other objections. One was, that the indictment was not correct because it was uncertain, for that the third count, as well as the second, was for stealing four warrants and orders (not saying how many orders) for the payment of the sum of £5 each. The Judges are all of opinion that what is meant by the indictment is, that you stole four instruments or four valuable securities, each of which is both a warrant and an order; and putting that construc-

tion upon the indictment, they are of opinion that the instrument you stole was a warrant and order. They are of opinion it is an order as well as a warrant, because, assuming the post-master had paid this order, the document itself delivered up to him would be a warrant, which would be a discharge from the person to whom he had to account for the post-office money. Therefore, they are of opinion, that the counts of the indictment are not uncertain, meaning that these are instruments having both characters, and that the count is proved.

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Another objection was also made, which was, that there was no proper proof that this was a regular post-office order, for it appeared that the signature of Mr. Towers the postmaster to the order and the signature to the letter of advice were different, and it was said that both of them could not be correct. The persons in the post-office, who have been in the habit of corresponding officially with the postmaster, were of opinion that one of the instruments was in the hand-writing of the postmaster, but there being a difference between that and the letter of advice, it was said that was a proof that the order was not in the hand-writing of the postmaster of Shrewsbury. And this objection might have been fatal, if it were necessary that this order should be in the hand-writing of the postmaster, but the Judges are of opinion that it is not necessary it should be in the hand-writing of the postmaster himself; it is enough that it is in the hand-writing of the postmaster or some person authorized by him to sign. There is no proof that the practice of the post-office required it should bear his personal signature. There was evidence that this document was handed by the post-office people at Shrewsbury to the person who received the money orders, and we are of opinion that there is sufficient proof that this was authorized by the postmaster. For these reasons all the arguments supported with great zeal and ingenuity by your learned Counsel, have failed. It is my duty, therefore, to pass the sentence upon you. It is a

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very serious offence, and one accompanied with much fraud and falsehood. You pretended to be the friend of Baker; you had heard that he was desirous of obtaining his discharge, and you contemplated by fraud depriving him of the whole of that money which he was so to receive. Looking at all the circumstances of this case, it is impossible my duty can be adequately discharged, without passing upon you as severe a sentence as the law permits for this offence, and that sentence is that you be transported beyond the seas for the term of seven years.

NOVEMBER SESSION, 1841.

BEFORE LORD DENMAN, C. J.

Dec. 2nd.

REGINA v. WILLIAM HENRY MENCE.

A servant being sent with a letter, and a penny to prepay the postage at a receiving-house, found the door shut; and, in consequence, put the penny inside the letter, and fastened it in by means of a pin, and then put the letter into the unpaid letter-box. A messenger in the General Post-Office stole this letter with the penny in it:—*Held*, that he might be convicted of stealing a post letter containing money, although the money was not put into the letter for the purpose of being conveyed by means of it to the person to whom it was addressed. But see the case of *Regina v. Rathbone*, ante, p. 220.

THE prisoner was indicted for stealing, on the 28th of October, a certain post letter containing a penny, the property of her Majesty's Postmaster-General, being at the time a person employed under the post-office of Great Britain and Ireland (a). There were other counts, varying the manner of laying the charge.

From the evidence it appeared, that a person named Morgan, living in Drury Lane, having occasion to send a letter to a person residing at Bristol, gave it to a female servant to take to the post, and at the same time gave her a penny for the purpose of paying the postage. The servant went to the post-office in Drury Lane, but finding

(a) See the statutory provisions applicable to this case in the notes to *Regina v. Rathbone*, ante, p. 220.

the shop shut, put the penny inside the letter, and fastened it with a pin, and dropped it into the letter-box, intending that the penny should be applied for the payment of the postage.

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The prisoner was a messenger in the General Post-Office, St. Martin's-le-Grand, and on the morning of the 20th of October, he was on duty in the inland office, and engaged with another messenger in stamping and preparing the letters from the receiving houses. The other messenger observed among the letters one with some coin, or something heavy in it, and a pin at the back of it: this letter the prisoner contrived to get into his possession, while the attention of the other messenger was diverted from him, and, on the constable of the post-office being sent for, after a severe struggle it was taken from him.

Clarkson, for the prisoner, in his address to the jury, suggested, that this letter might not be considered by them as a money-letter, and, if so, they might acquit the prisoner of the more serious part of the charge.

Lord DENMAN, C. J., in summing up, told the jury that, in his opinion, the letter came within the description in the act of Parliament, viz. a letter containing money; and although the money was not put in for the purpose of its being conveyed in the letter to the country, yet that it was in fact money contained in the letter; and though it was only of small amount, yet the intention of the prisoner, and the breach of trust, and the dishonesty committed by him, were the same as if the money had been of larger amount, and had been enclosed in the letter to be sent into the country (a).

Verdict—Guilty.

Adolphus, and *Bodkin*, for the prosecution.

Clarkson, for the prisoner.

[Attornies—*Peacocks*, and *Flower*.]

(a) See, however, on this point the reason of the decision in *Regina v. Rathbone*, ante, p. 220.

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BEFORE MR. BARON PARKE.

Dec. 3rd. REGINA v. JOHN RICHARD PACKARD, JOSEPH PACKARD,
AND ALFRED KENNETT.

MANSLAUGHTER.—The indictment stated, that the three prisoners, on the 5th of November, at &c., did *give, administer, and deliver* to one Michael Aungier divers large and excessive quantities of spirituous liquors mixed with water, and also divers large and excessive quantities of wine and porter, to wit, one pint of brandy mixed with water, one pint of rum mixed with water, one pint of gin mixed with water, two quarts of wine, called port wine, and one quart of porter, and then and there unlawfully and feloniously did *induce, procure, and persuade* the said Michael Aungier to take, drink, and swallow down into his body the said quantities of spirituous liquors mixed with water, and of wine and porter; the said quantities &c. being then and there, when taken, drunk, and swallowed by the said M. A., *likely to cause and procure his death, and which they the said J. R., J. P., and A. K., then and there well knew*; and that the said M. A. did then and there, by means of the said inducement, procurement, and persuasion, &c., take, drink, and swallow down into his body the said large quantities &c., so given &c. unto him as aforesaid, by means whereof the said M. A. then and there became and was greatly drunk and in-
 An indictment for manslaughter stated that the prisoners gave, administered, and delivered to one M. A. divers large and excessive quantities of spirits and water, wine, and porter, and induced, procured, and persuaded him to drink them; the said quantities &c. being likely to cause death, which they well knew. It then averred that M. A., by their persuasion &c., drank &c., and became greatly drunk and dis-tempered &c.; and while he was so, the prisoners assaulted him and forced him to go into, and placed and confined him in a cabriolet, and drove and carried him about in it for two hours, and thereby greatly shook and knocked him about, by means whereof he became mortally sick, &c., and of the said large and excessive quantities &c., and of the said drunkenness &c. occasioned thereby, and of the said shaking &c., and of the sickness and disorder occasioned by it, he instantly died. The deceased was a man in possession under the sheriff; and one of the prisoners, of whose goods he was in possession, assisted by his brother and a friend, piled the man with liquor, themselves drinking freely also, and when he was very drunk put him into a cabriolet and caused him to be driven about the streets; and about two hours after he had been put into the cabriolet he was found dead:—*Held*, that, if it were essential to prove that the prisoners knew that the liquors were likely to cause death, the case would be one of murder and not of manslaughter, but that such allegation was not a material part of the indictment, but might be dismissed from the jury's consideration:—*Held*, also, that if the prisoners, when the deceased was drunk, put him into a cabriolet and drove him about in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter.

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toxicated, sick, and greatly distempered in his body, and while he, the said M. A., was so drunk, &c., as aforesaid, they, the said J. R. P., J. P., and A. K., did then and there, to wit, on &c., at &c., make an assault on him, the said M. A., and then and there unlawfully and feloniously *forced and compelled him to go, and put, placed, and confined him in a certain carriage, to wit, a cabriolet, and then and there drove and carried him about therein* for a long time, to wit, for two hours then next following, and therein and thereby then and there greatly *shook, threw, pulled, and knocked about* the said M. A., by means whereof the said M. A. then and there also became mortally sick and greatly distempered in his body; of which said large and excessive quantities of the said spirituous liquors &c., so by him the said M. A. taken &c., as aforesaid, and of the said drunkenness &c. occasioned thereby, and of the said shaking &c., and of the said sickness and distemper occasioned thereby, he the said M. A. then and there instantly died. The indictment concluded with an allegation in the usual form, viz.—“that the said J. R. P., J. P., and A. K., the said M. A., *in manner and form aforesaid, unlawfully and feloniously did kill and slay,*” &c.

Clarkson, in his opening address, after stating the facts, contended, that, if the prisoners had an *unlawful* design to get the deceased out of the house, and in the prosecution of that design caused his death, they must be found guilty of the offence of manslaughter.

The facts of the case were as follows:—The prisoner, John Richard Packard, was a chemist in Drury Lane; and on the 5th of November, 1841, an officer of the Sheriff of Middlesex named Hamblyn, having a warrant against his goods, executed it about twelve at noon, and left the deceased, Michael Aungier, in possession for him. Aungier, according to the evidence of Hamblyn, was a man in good health, about sixty years of age, and was quite sober at the time he was left on the premises, about one o'clock in the

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day. The deceased remained in the kitchen of the house, and was quite sober up to nine o'clock in the evening. At that time John Richard Packard went into the kitchen, and the deceased asked him for a glass of gin. He replied,—"Very well, you shall have it;" but instead of a glass of gin, gave him a glass of rum and water, which he drank. About half-past nine J. R. Packard asked him to go into the parlour. A lad, who was in the service of John Richard Packard, described what took place after this as follows:—"I went into the room and found master, Mr. Joseph Packard, and the officer there, and the maid servant—the prisoner Kennett was not there then—there was spirits on the table in tumblers, and wine glasses too; there was no wine on the table then. I cannot say whether there was wine in the wine-glasses. They appeared to be drinking. *The officer did not seem to have anything the matter with him then.* About half an hour after I was called in again—the same glasses were on the table as I had seen before; there was rum in the officer's tumbler—there was some red wine on the table in tumblers, and rum and water as well, and there was gin and water—master kept gin in that room in a gallon stone bottle, which was in the cupboard—the spirits had been poured out of the stone bottle into the tumblers—the same persons were still at the table, with the maid servant, and *Kennett* was there the second time I went in—he had come about ten o'clock. When I went in the second time, master sent me with a note to the Garrick's Head public-house, which I took—it was about ten o'clock. A man returned with me to the house—master gave him an order for supper for four, to be brought at half-past twelve o'clock; the glasses were still on the table—the rum and wine were also kept in stone bottles—some of the glasses were empty, and some full; they appeared to be drinking continually; I was in and out of the room from then till half-past twelve, and the materials for drinking were still on the table, and they appeared to be still drinking; the supper came at half-past twelve, and two bottles of red

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wine in decanters; I placed them on the table; all the three prisoners were at that time sitting round the table, with the deceased and maid-servant; I waited at supper; the maid-servant supped with them; I saw red wine given to the officer; the maid-servant drank wine as well as themselves; there was no spirits on the table then; I fetched two more bottles of red wine during supper, by master's directions, about one o'clock, making four bottles; it was all drunk except a very little at the bottom of the decanter; it was all drunk in wine glasses; three pints of porter were sent for, that was not all consumed; there was very little left; I cleared the table after supper: after the table was cleared, the maid-servant took something out of the cupboard in stone bottles, by master's directions; only one bottle was brought out while I was there; I cannot tell whether it was gin or rum; when I went into the room again, I saw some spirits in tumblers; it appeared to be rum; what was in the officer's tumbler was red; it was nearly full; they were still round the table, and continued drinking there for about half an hour after I cleared the supper away; that would make it about half-past one o'clock; I went into the room again at the end of that time; the officer was then very tipsy, and did not appear able to help himself; master directed me to go and fetch a cab; Mr. Kennett joined in that order; the prisoner, Joseph Packard, was present at the time; after getting the cab, I went into the room and told master I had got it; my master and Mr. Kennett lifted the officer down stairs into the little room behind the shop called the surgery; he did not appear at all able to help himself at that time; master put a smelling-bottle to his nose in the surgery, and said, "This will do you good;" the deceased made no answer to that; I do not know whether he was able or not; they then lifted him up stairs again, and put him on the sofa; he remained there about a quarter of an hour; the cab was waiting; I saw some water in a tumbler, and some spirits put into it by Mr. Kennett; my master and Joseph

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Packard were in the room ; they gave the tumbler to the man while he laid on the sofa ; they put it to his mouth ; he took it ; he remained on the sofa about a quarter of an hour ; master and Mr. Kennett then carried him down stairs ; Joseph Packard followed them down ; they lifted him into the cab, and shut the door ; master and Mr. Kennett went with the cab, and Joseph Packard stopped at home ; it was about three in the morning when the cab went away ; my master and Kennett returned in about half an hour ; I went to bed about four o'clock, and got up between eight and nine."

The cab-driver said,—“ About half-past three, the three prisoners came to me, and said, there was a friend of theirs rather tipsy ; they wished me to drive him home ; they gave me a glass of brandy and water ; they all three spoke to me ; after that, two of the gentlemen, I cannot say which, brought a person down stairs very tipsy ; I did not see the third ; they assisted the man down stairs by his arms ; he seemed very tipsy ; they took him up stairs again. He was brought down in about twenty minutes ; I cannot say which brought him down ; the three gentlemen were there ; he was in a very helpless state ; two of the gentlemen assisted him into the cab, and the same gentlemen went with me on the box ; the third remained in the shop. I was directed by one of them to go to the Hummums, in Covent Garden ; when I got there, they both got down, and told me to take the deceased to No. 18, Chancery Lane, giving me half-a-crown ; they did not open the door of the cab, or take any notice of the man inside ; they left. I drove to No. 18, Chancery Lane ; knocked, but could not procure admission ; I staid there, trying to get in, five or ten minutes ; I then tried to arouse the man in the cab, but could make no sense of him ; I drove back to the house in Drury Lane, and rang the night bell three or four times, but could not get any answer. I then took him to Bow Street office ; he was then crouched down at the bottom of the cab ; I lifted him on the seat, and went to the inspector, and stated the case to him, leaving the

man on the seat of the cab ; he groaned at that time, or made some noise ; the inspector could not interfere, and I went round to Drury Lane again, with the man in the cab, and rang the bell, but could not make any body hear ; I brought him back to Bow Street, took him out, and put him on the step of a door, and waited till a policeman came up, which was two or three minutes ; I cannot say whether he was alive or not when I put him on the step ; he was in a very helpless state ; the policeman looked at him, and said he was dead ; we took him to the station on a stretcher ; I went with a policeman to Drury Lane again between four and five, and rang the bell, but nobody answered ; as I returned to Bow Street, about five in the morning, with the policeman, I saw Joseph Packard and Kennett ; I pointed them out to the inspector, who took them."

Two surgeons were called as witnesses. They had made a post-mortem examination of the body of the deceased. After a long examination and cross-examination, one of them was asked by the Court this question, with reference to the deceased :—"Supposing he had a quantity of spirits and water and port wine, together with his food, and afterwards was placed in a cab, and driven about from place to place, looking at the state of his body after death, what should you attribute his death to?" The answer was,—“I should be fearful that such treatment had accelerated his death.” The other, in answer to a similar question, returned a similar answer.

Montagu Chambers, for the prisoner John Richard Packard.—This seems to be a case of first impression. I have not been able to find any case like it in its circumstances, and, therefore, we must refer to first principles. I do not dispute the general rule of law, that if a person, in committing an unlawful act, causes the death of another, he is guilty of manslaughter. After referring to Mr. Justice Foster's work on the Crown Law, p. 258, he proceeded thus :—This raises the first, but not the most important

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question in this case, viz., what may be said to amount to *an act done*, whether it be *malum in se* or *malum prohibitum* merely. If the prisoners unlawfully got the deceased out of possession, and, in so doing, did an act not likely to occasion death, it might be merely *malum prohibitum*, and not *malum in se*, and they might not, in such case, be guilty of manslaughter. But I submit that the material allegation in the indictment is not made out by the evidence. It is averred that the prisoners administered to the deceased, and also persuaded him to take, divers large quantities of spirits, &c., being, when taken, *likely to cause and procure his death*. This, I apprehend, is a material averment; and that which follows is also material—and which the said J. R. Packard, J. Packard, and Alfred Kennett, *then and there well knew*. You must be satisfied that the prisoners well knew that the spirits and water &c. which the man took, were likely to procure his death. This, I apprehend, you will negative, as it is inconsistent with the evidence, and would be a most uncharitable thing. These are not mere inducements, but material statements of the cause of death, just as much as if a special verdict had been found, comprizing these facts among others. The indictment then avers, that the deceased became sick and distempered &c., and that the prisoners, after this, made an assault upon him, and forced and compelled him to go into a cabriolet, &c. &c. I submit, that, in order to find the prisoners guilty, you must find that they persuaded the deceased to drink, well knowing that what he drank was likely to cause death; and that they, when he was intoxicated, forced him into the cabriolet, and shook him. If there was a fourth cause, such as the large quantity of solid food; or a fifth, viz. water in the ventricle; or a sixth, the adhesion of the scull-bone to the dura mater; you cannot find that the death was occasioned by the three first-mentioned causes, or either of them. The answer to the question which I put to the surgeon on the subject of dinner parties is material, be-

cause it does not follow that a man who presses another to take more than is good for him is to be made answerable for the offence of manslaughter. There is no pretence, from the circumstances of the case, for saying that there was any *original* intention to get the man out of possession by making him tipsy. There was nothing more at first than incautious kindness; and, when they were all drunk, they played the joke of sending him to the sheriff's officer with their compliments; for it is proved that the sheriff's officer, Thompson, lived in Chancery Lane, and on the same side of the way as No. 18, though not at that number; and a mistake in the number will not be sufficient to shew any bitterness against the deceased on the part of the prisoners. If they had any such object as getting him out, they might, in a few minutes, very easily have put some narcotic into his beer, which would have sent him asleep for a time, without doing him any serious injury; and they might then have removed the goods; and he, on coming to himself, would have found that his possession was of no use. Up to the time of the man's death, there is nothing which shews a preconceived determination to do an unlawful act. The prisoners did no more than act imprudently, and cannot, therefore, be convicted of manslaughter.

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C. C. Jones addressed the jury for the prisoner Kennett, and *Charnock*, for Joseph Packard.

PARKE, B., in summing up, (after some observations as to the nature of the proceeding), said,—In order to convict the prisoners at the bar, you must be satisfied, first, that the officer owed his death to the act or neglect of the parties accused; and, secondly, that the act or neglect is properly described in the indictment. If the act were such as to denote wickedness and maliciousness of mind, it would amount to murder; but if merely negligence, then only to manslaughter (*a*). You must be satisfied

(a) See *Rex v. Marriott*, 8 Carr. & Payne, p. 425.

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that the species of death described in the indictment has been proved by the evidence; and for the purpose of assisting you in your conclusion on these matters, I will call your attention to what is stated in the indictment. [The learned judge then read the whole of the indictment, and then observed]—With reference to the allegation that the prisoners well knew that the quantity of liquor taken was likely to cause death, there does not appear to be any evidence of this; and it seems to be admitted on all hands, that they did not know what was likely to be the effect produced by the intoxication of the deceased. It is not necessary to prove the whole of what is contained in this indictment; but some part of what is properly alleged ought to be proved. I agree that if it were essential to prove that the prisoners knew that the liquors were likely to cause the death of the deceased, that you could not find your verdict against the prisoners. Such a finding would make the offence approach to murder; and, certainly, there is no evidence to sustain that imputation. You will, therefore, dismiss that part of the indictment from your consideration, and see whether there are proper and sufficient allegations in the rest of the indictment to constitute the offence of manslaughter, and whether those allegations are made out by the evidence. Should that be the case, you may find the prisoners guilty; and, in the event of your so doing, should I have any doubt whether the indictment would be sufficient without the allegation I have referred to, I can then reserve that point on behalf of the prisoners.

The first question will be, whether the prisoners, or any of them, put the deceased into the cabriolet; and upon this, I think, nothing need be said. If you are of opinion that they did, then the questions will be:—first, whether they, or any of them, were guilty of administering or procuring the deceased to take large quantities of liquor for an unlawful purpose; or whether, when he had taken it, they put him into the cabriolet for an unlawful purpose.

If you think that the three prisoners, or one of them, made him excessively drunk to enable the prisoner, John Richard Packard, to prevent the completion of the execution; or, if you are satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect, they must be found guilty. The simple fact of persons getting together to drink, or one pressing another to do so, is not an unlawful act, or, if death ensue, an offence that can be construed into manslaughter; and, if what took place in the present instance was really and solely for the purpose of good fellowship, for making merry, or causing the misfortunes of the elder Packard to be forgotten, though the act was attended with death, this will not be a case of manslaughter. Upon the first question I have stated, it will be essential to make out on this indictment that the prisoners administered the liquor with the intention of making the deceased drunk, and then getting him out of the house; and if that be doubtful, still, if you think that, when he was drunk, they removed him into the cabriolet with the intention of preventing his returning, and death was the result of such removal, the act was unlawful, and the case will be a case of manslaughter. If, however, you think they all got drunk together, and that afterwards he was put into the cabriolet with an intention that he should take a drive only, that was not an unlawful object, such as I have described, and the prisoners will be entitled to an acquittal; or, if you entertain a conscientious doubt as to their real object, you ought also, on that ground, to acquit them. [His Lordship then stated the circumstances of the case, and proceeded.] The first point to be decided is, whether the acts of the prisoners, whatever may be their character, were the cause of the death of the deceased. As to that, you are to look to the evidence of the surgeons, and see whether those acts caused the death of the deceased to take place when it did, that is to say, whether those acts

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accelerated his death. Now it seems to result from what the surgeons say—and assuming the facts in evidence to be correct—that the acts of the prisoners did accelerate the death, and if you are of that opinion, it will justify you in inquiring into those acts. One observation as to this is, that one of the prisoners might have had a motive in getting the sheriff's officer out of possession voluntarily for the purpose of disposing of the goods he had seized, and that, in furtherance of that motive, the original object of all was to make him drunk, and so to get rid of him. But, supposing you cannot clearly trace that intention, still you will have to inquire with what view they put him into the cabriolet, left him in Covent Garden, and gave a false address, to which they directed he should be driven. It is true that there is no direct proof that any one pressed him to drink, but if the liquor was placed before him with the illegal object I have mentioned, that would be enough, without such direct proof. You will, therefore, consider whether all three, or any of the prisoners, had this illegal object; whether they made the deceased drunk with a view of getting rid of him from the house, and then, with the same intention, put him into the cabriolet; or whether, having made him drunk without any such original object, when he was drunk they put him into the cabriolet for the purpose of so getting rid of him; and whether you are satisfied that the acts of the prisoners, or any one of them, done with such illegal object, contributed to his death.

The jury retired to consider their verdict, and on their return into Court asked a question of his Lordship, in answer to which they were told, that if the prisoners, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. They then immediately returned a verdict of

Guilty—and the prisoners were respectively sentenced to be imprisoned in Newgate for one calendar month.

Clarkson, and Bodkin, for the prosecution.

Montagu Chambers, for John Richard Packard.

C. Chadwick Jones, for Alfred Kennett.

Charnock, for Joseph Packard.

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[Attornies— ———, and *J. Scard.*]

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BEFORE MR. BARON GURNEY AND MR. JUSTICE WIGHTMAN.

REGINA v. RUSSELL.

Jan. 6th.

THE prisoner was indicted for feloniously assaulting — Abraham on the 21st of December, and cutting and wounding him on his head, left eyebrow, and nose, with intent to do him some grievous bodily harm.

The prosecutor and several of the witnesses for the prosecution were Lascars, and *C. Phillips*, before the jury were charged, intimated to the Judges that there was some doubt as to whether those witnesses had been properly sworn to give evidence before the grand jury.

GURNEY, B., and WIGHTMAN, J., were both of opinion that that was a matter which they ought not to inquire into; and also that the mode of swearing the witnesses to go before the grand jury, would not, if incorrect, vitiate the indictment; as the grand jury were at liberty to find a bill upon their own knowledge merely, and were anciently in the habit of doing so. And *Wightman, J.*, added, that the same point had arisen lately on the Northern Circuit, before Lord *Denman* and himself, and they, after

When the grand jury have found a bill, the judges before whom the case comes to be tried, ought not to inquire whether the witnesses were properly sworn previously to their going before the grand jury, and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge merely.

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considering the subject, were of the same opinion as had been expressed to-day (a).

The trial proceeded, and the prosecutor and such witnesses as were Lascars having been sworn in the manner which they considered binding—

The prisoner was eventually convicted of an assault, and sentenced to be imprisoned for eight days.

(a) There is another view that may be taken of the matter, viz. whether there was any impropriety in the mode of swearing the witnesses, as they, by not objecting to the form of oath administered, might be taken to have admitted that they considered it binding upon them. See the next case of *Regina v. Entrehman and Samut*.

REGINA v. ENTREHMAN and SAMUT.

Mode of swearing a Chinese witness.

THE prisoners were indicted for feloniously assaulting one Assang on the 16th of December, and cutting and wounding him on his left cheek, with intent to do him some grievous bodily harm.

The prosecutor Assang was a Chinese, and, not understanding the English language, an interpreter was sworn, and in reply to a question by *Gurney, B.*, said that he was acquainted with the mode of administering an oath to a Chinese witness, and described it in the manner in which it was afterwards administered, adding that he had frequently seen it so administered, and believed it to be binding in that form.

The prosecutor was then called, and on getting into the witness-box immediately knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The crier of the Court who swears the witnesses, then, by direction

of the interpreter, administered the oath in these words, which were translated by the interpreter into the Chinese language,—“You shall tell the truth and the whole truth: the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer.”

It appeared from the evidence, that a general quarrel arose between the sailors on board a ship called the Scalesby Castle, in the course of which the prosecutor was wounded.

C. Phillips addressed the jury for the prisoners, and they acquitted Samut and found Entrehman guilty of an assault.

Sentence—fourteen days' imprisonment.

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BEFORE MR. COMMON SERJEANT MIREHOUSE.

REGINA v. WILLIAM ABEL BALL.

Jan. 7th.

THE first count of the indictment was intended to state, that the prisoner, on the 10th of October, did falsely pretend to one John Easterbrook, that six thimbles which he produced were silver, and worth four shillings and sixpence, whereby he obtained the sum of two shillings and sixpence, &c. But this count was abandoned, because it did not contain the material word pretend. But there was another count which stated, that the prisoner, on the 22nd of December, did falsely pretend to the same person, that eleven thimbles which he then produced were silver, and of the value of five shillings or more, with intent to

A man went into a pawnbroker's shop in the middle of the day, and laid down eleven thimbles on the counter, saying, “I want five shillings on them.” The pawnbroker's assistant asked the man if they were silver, and he said they were. The assistant tested them, and found

they were not silver, and in consequence did not give the man any money, but sent for a policeman, and gave him into custody:—*Held*, that the conduct of the man who presented the thimbles amounted to an attempt to commit the statutable misdemeanour of obtaining money under false pretences, and by consequence that if money had been obtained that statutable offence would have been complete.

Sed quare, see *Regina v. Reid*, (8 Carr. & Payne, 848).

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cheat and defraud &c., but it did not allege that any money was obtained.

The facts of the case were these. John Easterbrook said, "I now live with Mr. John Savage, a pawnbroker in Whitechapel Road; I was formerly in the service of Mr. James Watts, a pawnbroker in Hereford Street, Commercial Road. On the 22nd of December, while I was in the service of Mr. Savage, the prisoner came about the middle of the day: he laid down eleven thimbles on the counter; he said, 'I want 5s. on them;' I asked if they were silver, he said, 'Yes;' I directed the apprentice to write a ticket; I turned my back to try if they were silver, and finding they were not silver I sent for a policeman, and gave the prisoner in charge with the thimbles; he said he had had them given to him. On the 10th of October, while I was in the service of Mr. Watts, the prisoner came and pledged six thimbles; he said he wanted 4s. 6d. on them; I said, 'Are they silver?' he said, 'Yes;' I said I could make it half-a-crown for him; he said, 'Very well; I merely want to give change for a sovereign;' I afterwards tried the thimbles, and they were not silver." On cross-examination he said, "We keep something to test these things with, and we generally do test them; I tried those on the 22nd of December."

William Gallila Saville said, "I am in the service of Mr. Joseph Tilley, a pawnbroker in Mile End Road. On the 22nd of December, about noon, the prisoner brought twelve thimbles; he asked me 7s. or 8s. on them, I forget which; I said, 'Are they silver?' he said, 'Yes; I bought them for silver.' I suspected they were not; I tested one of them, returned them, and said, they were not silver; he said, 'Are they not? I had them left with me for a debt;' my testing one of them left a mark on it, which it would be inconvenient to get off."

Payne, for the prisoner, argued as follows:—The statement made by the prisoner does not amount, in law, to a

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false pretence. It is merely an *untrue assertion*, which a pawnbroker need not credit, having the means of detection by him, but being too busy or too careless to make use of them. *Vigilantibus non dormientibus jura subveniunt*. In the case of *The Queen v. Thomas Tabram*, tried at the Middlesex Sessions, before Mr. Serjt. *Adams*, the party was indicted for obtaining money by falsely pretending, on one occasion, to a pawnbroker, that a certain material, which he produced, was "*gold shruff*;" and, on another occasion, that an article he produced was "*ribbon gold*." It appeared that gold shruff and ribbon gold were worth 3*l.* 18*s.* an ounce; but the thing which the prisoner said was gold shruff was worth only eighteen shillings an ounce. Both the articles produced were tried by the pawnbroker with aquafortis, and stood the test. Some days after the money was obtained, the pawnbroker *fled* the "*ribbon gold*," and found it was silver gilded over. After hearing the counsel on both sides, the Chairman, Mr. Serjt. *Adams*, was of opinion, that, as the defendant had merely stated an untruth with *reference to an article which he produced, and not about a fact which the person imposed upon could not detect at the time*, the untrue statement did not amount to a false pretence, but was only an *untrue assertion*. He likened it to the case of a tradesman who sold a waistcoat or coat as of a particular material when it was of an inferior sort; and asked whether it would be contended that such a man was to be liable to transportation? but he left the facts to the jury, who said they were of opinion that the defendant had passed off the articles, *well knowing them to be spurious*, and he was found guilty. The Chairman afterwards mentioned the case to several of the Judges, and said they agreed with him that the mere assertion that the article produced was what in fact it was not, was not sufficient to sustain the conviction: and the man was fined a shilling, and discharged. There were several similar charges against him, but they were not tried, in consequence of this decision. In the case of *Reg. v. Codrington*, (1 Carrington & Payne, 661), Mr. Justice *Little-*

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dale said, "The doctrine contended for on the part of the prosecutor would make every *breach of warranty* or *false assertion* at the time of a bargain, a transportable offence."

So in the present case, as the prisoner merely, when asked whether the thimbles were silver, said yes, they were, it was merely a false assertion at the time of the bargain, to which the rule of "*caveat emptor*" will apply. The pawnbroker's man admitted that he had a test which it was usual to apply, and he did in fact apply it, and detect the spurious nature of the thimbles, and, in consequence, refused to advance any money. I contend, that as, if the money had been obtained, it would *not have been false pretences*, so the first step towards obtaining it was not an attempt to commit that offence, such attempt merely consisting of the untrue assertion that the thimbles were silver. The case of *Tabram* was a stronger case than the present, as there the test of aquafortis was tried without detection. I take the distinction to be this: *a false pretence is a statement of something which the party defrauded cannot ascertain the untruth of, till after he has parted with his goods or money*; but that if he could ascertain its incorrectness *at the time*, it is merely a *false assertion*, and not a false pretence within the meaning of so highly penal a statute.

MIREHOUSE, C. S., in summing up, told the jury that there must be an intent to cheat; that the pretence must, in fact, be false; and so false, that a man, exercising reasonable discretion, *might* still be deceived by it.

The jury found the prisoner guilty on the second count, of the attempt to commit the statutable misdemeanor; and, at the request of the prisoner's counsel, with the assent of *Clarkson*, who was for the prosecution, judgment was respited till the next session, in order that the matter might be further considered.

Clarkson, for the prosecution.

Payne, for the prisoner.

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At the next session, the Common Serjeant stated, that he had mentioned the facts of the case, and also the argument for the prisoner, to some of the Judges, who were of opinion with him that, in point of law, the evidence was amply sufficient to justify the verdict, and that the verdict was, in point of law, good (*a*).

The prisoner was, therefore, sentenced to be imprisoned for four calendar months.

(*a*) This decision does not appear to place the law on the subject in any very satisfactory point of view, inasmuch as it is directly at variance with the decision in the case cited, and it does not appear from the judgment either of the learned Chairman of the Sessions, in the one case, or the learned Common Sergeant, in the other, who the Judges were whom they respectively consulted. And there does not seem to be any reported case which had previously expressly decided the question. It is true that the statute uses the words "any false pretence;" but the meaning of the word "pretence" according to Johnson's Dictionary, is "*a false argument, grounded on fictitious postulates,*" which is clearly something more than a mere naked lie, the falsehood of which the person to whom it is uttered can detect at the moment by the

immediate application of a test. In the case of *Rex v. Reed*, 7 Carr. & Payne, 848, which is the nearest in circumstances to the present, a man was charged with falsely pretending to one L. C., that a certain quantity of coals which he delivered to him weighed 16 cwt., and that they were worth the sum of £1; whereas they did not weigh 16 cwt., and were not worth £1, but weighed only 896 lbs., and were worth only 10s. The fifteen Judges held, that these two false assertions were not sufficient to maintain the indictment, and that another statement, that a certain weight which the prisoner had was a 56lb. weight, whereas it was only a 28 lb. weight, could not be taken into account to support the indictment, as there was no account connecting the sale of the coals with the use of that weight.

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REGULA GENERALIS.

In the course of the session the Court laid down the following general rule:—

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“IT IS ORDERED by the Court, that, henceforward, whenever a prosecutor shall have preferred a bill of indictment against a defendant, and shall move the Court for process to issue upon the said indictment against the said defendant, the prosecutor so applying shall, before such process shall issue, himself enter into such recognizance as the Court shall direct, to prosecute the law with effect against the said defendant.”

FEBRUARY SESSION, 1842.

BEFORE MR. BARON GURNEY.

Feb. 4.

REGINA v. JAMES HOPKINS.

Seemle, that where a man by false and fraudulent representations induced the parents of a girl, between 10 and 11 years of age, to allow him to take her away, such taking away of the girl is an abduction within the meaning of the stat. 9 Geo. 4, c. 31, s. 20.

ABDUCTION. The indictment stated that the prisoner, on the 6th of December, in the fifth year, &c., with force and arms, &c., unlawfully did *take and cause to be taken* one Mary Ann Howell, an unmarried girl, under the age of sixteen years, to wit, of the age of ten years, out of the possession and *against the will* of William Howell, her father, (he, the said William Howell, then and there having the lawful care and charge of her, the said M. A. How-

ell), against the form of the statute in such case made and provided (a), and against the peace, &c.

The prisoner was a person nearly sixty years of age, who had been known to the parents of the child for twenty years, and had been their landlord for seven years. On the 6th of December, 1841, the child's mother paid him a week's rent, and he said to her, "Now, Mrs. Howell, you were speaking of a place for your little boy; I have not heard of a place for him, but I think I have heard of one for your daughter." The mother said, she thought *the child was too young*, being only between ten and eleven years of age; but the prisoner replied, that she was quite old enough for what he wanted her for; and added, that it was only to go to Southampton with a lady who was ill, to nurse a baby which she had and go on errands. The prisoner called for the child in the course of the same day, and took her away in a cab, saying that the lady was too ill to come herself. He did not, however, take her to any lady, but kept her with him from Monday till Friday, and slept in the same bed with her every night, and then brought her home; when, in consequence of her complaints of his conduct to her, he was given into custody. The prisoner had arranged it first, that the lady was to come and fetch the child; and, upon this being communicated to the child's father, it was agreed by him and the mother that the child should go.

The father of the child said—"I parted with my child on the representation that she was to go to live with a lady, to go to Southampton; it was a very wet evening, and I asked where the lady was; he said she was at tea at his

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(a) The statute 9 Geo. 4, c. 31, s. 20, enacts, "That if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father and mother, or of any other person having the

lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to suffer such punishment by fine or imprisonment, or by both, as the Court shall award."

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house; so I let the girl go, believing his representation to be true."

The mother, on her cross-examination, said that she had known the prisoner a long time as a respectable man, and the father of fifteen children; and that she would have let the child go with him if he had told her she was to go and live at his house as a servant.

Price, for the prisoner, proposed to ask the same question of the girl's father, but—

GURNEY, B., interposing, said, that he did not see how it could affect the case to shew what the father would have done under a different state of circumstances.

The question, therefore, was not put.

Price then addressed the jury for the prisoner.—The prisoner is indicted for the offence of what is called in law abduction. A child may be taken away from its parents for improper purposes, and it may be taken not from improper purposes. This is the offence, I suppose, sought to be established. And also a child may be stolen from her parents. In cases of stealing and assaulting feloniously, the child must be under ten years of age. There was, in this case, the consent of the parents that the child should go away with the prisoner. But the answer will be, that the child was not taken away *bonâ fide*, but under a false pretence that she was to go and live with a lady. Why such a pretence should be made at all, I cannot understand, as it appears that consent would have been given under all or any circumstances.

GURNEY, B.—I think, Mr. Price, it is a case so new in its kind, that I should think it right to reserve that point for the consideration of my Brothers.

Price.—Abduction is, in point of law, a stealing; and abduction for an hour would be sufficient if the charge

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were made before the bringing back of the child ; but if the child is brought back before prosecution, it is only a trespass. The question is, whether you are satisfied that there was a depriving the parents of the child. The question is, whether this child was stolen or not ; or, in other words, whether that has been done which, if she had been under ten years of age, would have been a felony. A person may be too old, as well as too young, to commit a particular offence. A boy under fourteen cannot, by law, commit a rape. It may have been the prisoner's original intention to take the girl to live with a lady ; and, on the journey down, he began to think of a different course ; and this would not be, in law or in fact, abduction. It is a case for an acquittal, if you shall think that the abduction was not complete, or that it did not take place *against the consent* of the father. Any seducing of a young female for an hour would be an abduction if this is one. That would be absurd. And, in this case, the keeping the girl for three or six days makes no difference ; it is merely a question of time. There is no intention shewn to deprive the parents of their child.

GURNEY, B., after stating the charge in the indictment, said—This is founded on an act of Parliament which makes that an offence ; and it is put to you, on the part of the prosecution, that the charge is made out ; because it is said, that the consent of the father having been obtained by the fraudulent representations of the prisoner is, in truth, no consent at all. And there are several cases which illustrate this doctrine : as, for instance, if a man pretends that he wants your horse to go to Windsor, and promises to bring it back, it will be a stealing if he parts with it, although you gave your full consent to his taking it, provided the jury think, at the time he took it, he did not intend to borrow but to steal it ; so, if a burglar pretends that he is a person who has particular business with you, which induces you to open your door, and he gets in, it is as much a breaking as if he himself had opened the

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door by violence. I mention these cases to shew that the law has long considered fraud and violence as the same. I shall leave the case for your consideration, and you will say whether the father has been induced by false pretences on the part of the prisoner to part with the possession of his child. If you find the prisoner guilty, I shall reserve the case for the opinion of the Judges as to the law; because I am not aware that there is any case precisely like it, though there are some cases which have some bearing on the subject. It has been contended, on the part of the prisoner, that if a man takes away a horse, and brings it back before he is indicted, that is not felony. But that is not precisely so. It may raise a question whether there was, in such a case, an intention to steal; but, if there was that intention, the bringing back the property will not purge the offence. The question for your decision is, whether the prisoner obtained the child by false pretences, that is, by tricking the parents out of their consent by a fraudulent representation. It has been suggested that the prisoner might originally have intended to take the child to a lady; but that is for him to shew, if such was the fact.

Verdict—Guilty.

Ballantine and Carter, for the prosecution.

Price, C. Phillips and Clarkson, for the prisoner.

[Attornies—*Tinslay*, and ———.]

The prisoner was then tried on an indictment which charged him with an attempt and endeavour carnally to know the girl, she being between the ages of ten and twelve; and, being found guilty, he was sentenced to be imprisoned for eighteen calendar months.

GURNEY, B., upon this said, that it would not be necessary further to consider the other case, as it was not his intention to pass any sentence upon the prisoner on that indictment.

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MARCH SESSION, 1842.

BEFORE MR. COMMON SERJEANT MIREHOUSE.

REGINA v. CHARLES WILLIAMS and WILLIAM WILLIAMS. *March 4.*

THE indictment charged the prisoners with unlawfully having in their possession five pieces of false and counterfeit coin, resembling and apparently intended to resemble the Queen's current silver coin called sixpences, knowing the same to be false and counterfeit, and with intent to utter and put off the same.

Charles Williams pleaded guilty to the charge.

Payne, in stating the case for the prosecution against William Williams, observed that, to convict a person under 2 Will. 4, c. 34, s. 8, such person must be shewn to have had three or more pieces of counterfeit coin in his custody or possession (a), and that the only person in whose possession, in the present case, the requisite number of pieces in fact were, was the prisoner Charles Williams, who had pleaded guilty; but there was a provision in the 21st section of the statute (b), which would render the

In order to convict a person charged on the stat. 2 Will. 4, c. 34, s. 8, with having in his possession more than three pieces of counterfeit coin, with intent to utter them, it is not necessary that the possession should be individual possession, but it is enough if the coin be in the possession of the person charged, or his immediate agent: as the interpretation clause of the same statute (s. 21) provides for such a case; therefore where

two persons were taken into custody together, one of them having on him sixteen pieces of counterfeit coin, and the other only two pieces, the Judges held, that the person who had only the two pieces might, in point of law, be convicted as well as the person who had the sixteen.

(a) That section enacts, "That if any person shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling, or apparently intended to resemble, or pass for any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter and put off the same, shall be guilty of a misdemeanor," &c.

(b) That section (inter alia) declares, that where the having any matter or thing in the custody or possession of any person is in the act expressed to be an offence, if any person shall have any such matter in his *personal* custody or possession, or shall knowingly and wilfully have any such matter in any *dwelling-house*, &c., whether belonging to or occupied by him-

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other prisoner who was acting in concert with him equally answerable; and, in point of law, the possession of Charles was, under the circumstances, the joint possession of both. He referred to the case of *Regina v. Rodgers*, in which that point had been settled by the fifteen Judges (c).

self or not, and whether such matter shall be had *for his own use or benefit or for that of another*, he shall be deemed to have it in his custody or possession within the meaning of the act.

(c) That case was tried at Liverpool, at the Summer Assizes, in the year 1838; and, at the Spring Assizes in 1839, judgment was pronounced, as follows, by Mr. Baron Parke:—William Rodgers, you were tried at the last Assizes before my learned Brother Alderson upon an indictment framed upon the 2 Will. 4, c. 34, s. 8, and found guilty of having in your possession more than three pieces of counterfeit coin, with intent to utter the same. It appears that you were taken in company with a man named Thomas Large; and upon your person were found two base shillings, and upon Large sixteen counterfeit shillings were found; and it became a question whether you had committed an offence within the meaning of the act of parliament. Upon referring to the interpretation clause, I find it enacted, “that if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or bene-

fit, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession, within the meaning of this act.” It was contended that you had in your individual possession only two shillings; and my learned Brother entertaining some doubt upon the case, reserved the point for the consideration of all the Judges, and mentioned it in the presence of all the Judges, except my late Brother Park, and Baron Bolland, who has since retired: the matter underwent much discussion, and it was ultimately agreed by all that the offence had been committed by you. By the interpretation clause (the 21st clause), it is stated, “that if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, it shall be an offence within the meaning of the act.” The act of parliament does not require *individual possession* of any counterfeit coin, *but it is quite enough if the coin be in the possession of the person or his immediate agent*; and although you had no more than two counterfeit shillings in your own individual possession, or personal custody, *yet you had more in the possession of your immediate agent*. The Judges, therefore, were of opinion that you have committed the offence described in

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From the evidence it appeared, that, on the 5th of February, between six and seven in the evening, both the prisoners, Charles and William Williams, were seen by a police constable in company together near Westminster Bridge. He gave his evidence as follows:—"I watched them, and when they were near the Obelisk in Westminster Road, I saw Charles Williams give something to William Williams, who went near a shop window and rubbed it with his finger; he then crossed the road and went into Mrs. King's oil-shop; Charles remained on the opposite side of the road; William remained in the shop two or three minutes; he then came out and joined Charles; they went down the London Road and up Kennington Road; I then saw William rubbing something under a lamp opposite Mr. Bright's shop; he then went into the shop and came out again; Charles was standing across the road under the lamp; when William came out of Mr. Bright's shop, he went on, and went into Mr. Curtis's; Charles was standing across the road; when William came out of Curtis's he joined Charles again and they went on to Lambeth Walk; I followed them and laid hold of Charles by the throat; he struggled, and we both fell to the ground; he spat out five sixpences, which I produce; I searched him and found on him five-pence halfpenny in coppers, some tobacco and some stuff they call skim, which is used for rubbing sixpences; it was quite damp when I found it in his pocket."

Mr. Field, inspector of coin to the mint, said—"These five sixpences are all counterfeit; three are cast in one mould and two in another; the effect of rubbing the coin with dirt, or some mixture, would be to make it appear

the act of parliament. My Brother *Alderson*, who tried you, has directed me as to the amount of punishment which he would have awarded you. You have been in custody seven months; and, if he had passed sentence upon you, he would have sentenced you to eigh-

teen months' imprisonment. The sentence of the Court upon you, therefore, is, that you be imprisoned in the house of correction at Kirkdale for eleven calendar months, and that, during that time, you be kept to hard labour.

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dark, as if it had been in a dirty or greasy pocket, or in circulation."

It was also proved that William Williams uttered one counterfeit sixpence at King's and another at Curtis's, at the times when he was seen to go there by the policeman.

William Williams was found guilty, and both prisoners were sentenced to nine months' imprisonment.

Payne, and *Lucas*, for the prosecution.

[Attornies—*Powell*, and ———.]

HOME SPRING CIRCUIT, 1841.

KINGSTON ASSIZES.

BEFORE MR. BARON PARKE.

BYE v. BOWER and CROOKS.

In replevin upon a taking of goods in a public-house and a brewery, there was an avowry as to the taking in the public-house only

(omitting the brewery). The Judge at the trial would not allow the avowry to be amended by inserting the brewery.

The 23rd section of the stat. 3 & 4 Will. 4, c. 42, does not extend to the amending of *omissions* in pleading.

To prove that A. and B. took a distress, a witness was called, who stated that he saw two persons (whom he did not then know) take the distress, and that he had since learnt that their names were A. and B., and that he had seen A. in Court. Another witness, who knew A., proved that A. had been in Court:—*Held*, that this was evidence to go to the jury as to A., but not as to B., and that as to B. the evidence was not sufficient.

brewery). Pleas in bar to the avowry and cognizance, non tenuit, and riens in arrear.

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Peacock, for the defendant, applied for leave to amend the avowry and cognizance, (under the stat. 3 & 4 Will. 4, c. 42, s. 23 (a),) by extending them to the brewery as well as the public-house, on the ground that the omission as to the brewery had occurred from mistake only.

PARKE, B.—I think that I ought not to allow this amendment. It is an omission that you are asking to amend, and not a variance. I think that it is not within the scope of the 23rd section of the stat. 3 & 4 Will. 4, c. 42 (b).

No amendment was made.

To prove the distress, a witness was called, who stated that he saw the goods taken by two persons, whom he then did not know, but that he afterwards learnt that one of them was named Bower and the other Crooks.

Peacock, for the defendants.—I submit that there is not sufficient proof of identity.

PARKE, B.—Not at present, certainly.

The witness further proved that, since he had been in Court, he had seen one of the persons who had made the distress, and whose name he had learned to be Bower; and it was also proved by another witness that the defendant Bower (whom this witness had known before) had been in Court.

PARKE, B.—I think that there is evidence to go to the

(a) 6 C. & P. p. 531, n. a.

(b) See the case of *John v. Currie*, Id. p. 618.

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jury as to the identity of the defendant Bower, but not as to that of the defendant Crooks.

The case was referred.

Channell, Serjt., and *Clarkson*, for the plaintiff.

Peacock, for the defendant.

[Attornies—*Kearns*, and *Cooper*.]

WELSH SPRING CIRCUIT, 1841.

GLAMORGANSHIRE ASSIZES.

BEFORE MR. JUSTICE COLTMAN.

REGINA v. PETER WATKINS.

BURGLARY. The indictment charged that the prisoner "feloniously and burglariously, by night, the dwelling-house of one John Davies did break and enter, with intent one Alice Davies in the said dwelling-house then being violently and against her will *then and there* feloniously to ravish and carnally know; and that the said Peter Watkins then and there in the said dwelling-house with force and arms feloniously did wound, beat, and strike the said Alice Davies, then being in the said dwelling-house," &c.

The burglariously breaking and entering a dwelling-house with intent to commit a rape, is not a crime which includes an assault; and therefore in an indictment for such a burglary the prisoner cannot be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85.

An indictment charged a prisoner with having burglariously broken and entered a dwelling-house, "with intent one A. D. in the said dwelling-house then being violently and against her will *then and there* feloniously to ravish and carnally know;" whether that allegation is sufficient without the addition of the words, "in the said dwelling-house," after the words "then and there." *Quere?*

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E. V. Williams, for the prisoner.—I submit that the indictment is not sufficient. Burglary is defined to be a breaking and entering of the dwelling-house in the night time with intent to commit a felony therein. The indictment ought to have alleged the intent to be to ravish Alice Davies in the said dwelling-house, and not merely “then and there” (a).

COLTMAN, J.—I shall certainly not stop the case on this objection; and if the jury should acquit the prisoner of the burglary, I will take the opinion of the jury as to the assault, though I much doubt whether a breaking into a dwelling-house in the night time with intent to ravish is a felony which includes an assault; and I will reserve the points for the consideration of the Judges, if it should become necessary.

The jury found the prisoner not guilty of the burglary, but guilty of the assault.

W. M. James, for the prosecution.

E. V. Williams, for the prisoner.

[Attornies—*Perkins & James*, and *Meyrick & Davies*.]

In the ensuing Term, the case was considered by the fifteen Judges, who were of opinion that the breaking and entering a dwelling-house with intent to commit a rape, was not a crime which included an assault. The other point was not considered by their Lordships.

(a) If this objection be valid, it seems that it would be necessary also to add the words “in the night time,” in addition to those suggested. See the case of *Reg. Curnock*, 9 C. & P. 730; and *Reg. v. Andrews*, ante, p. 121.

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WESTERN CIRCUIT.

HAMPSHIRE ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE COLERIDGE.

Feb. 26.

CASTLEMAN v. HICKS.

The plaintiff impounded the cattle of S. for rent arrear. The defendant had before claimed the cattle as his own, denying the title of S. Two days after the distress the cattle were

POUND BREACH.—Declaration that William Stone, a tenant to the plaintiff, was in arrear of rent, for which the plaintiff had seized his cattle, and impounded them in a certain field; and that the defendant broke the pound and took away the distress.

Plea, Not guilty; (the plea had “by statute” in its margin (a).)

missing, and were found in the defendant's barn. The plaintiff brought his action for pound-breach under the 2 W. & M. s. 1, c. 5, s. 4 (b), and the defendant pleaded not guilty, with “by statute” in the margin of the plea:—*Held*, that the statute was not a penal enactment under 21 Jac. 1, c. 4 (c), so as to let the defendant into any matters of defence on the issue of ‘Not guilty’: that the rent due was admitted, and the distraint of the cattle under it, and their impounding, and the legal sufficiency of the pound; and that the only questions for the jury under the issue ‘Not guilty’, were whether the pound was broken by any other than the cattle themselves, and whether, if so, the defendant broke it.

Semble—An open field is a pound sufficient at law in which to distrain cattle for rent arrear.

(a) Rule of Court, T. T. 1 Vict.

(b) 2 W. & M. sess. 1, c. 5, s. 4.—“Upon any pound-breach or rescous of goods or chattels distrained for rent, the person or persons grieved thereby shall, in a special action on the case for the wrong thereby sustained, recover his and their treble damages and costs of suit against the offender or offenders in any such rescous or pound-breach, any or either of

them, or against the owners of the goods distrained, in case the same be afterwards found to have come to his use or possession.”

(c) 21 Jac. 1, c. 4, s. 4.—“If any information, suit, or action, shall be brought or exhibited against any person or persons for any offence committed, or to be committed, against the form of any penal law, either by or on behalf of the king, or by any other, or on the behalf of

The action was brought under 2 W. & M. sess. 1, c. 5, s. 4, to recover treble damages and costs for the rescue mentioned in the pleadings.

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It was opened by *Erle* (*Butt* was with him), for the plaintiff—

That on the 19th of June, 1841, an execution on a writ of *fi. fa.* was levied on Stone's effects on a judgment obtained by the Messrs. G. and R. Ledgard, under which the cattle mentioned in the declaration were taken. On the 25th of June, 1841, the defendant served the sheriff with notice that the cattle in question were his property, and not that of Stone.

The sheriff, not being indemnified by the attornies for G. and R. Ledgard, then abandoned the execution which he had put in, and the cattle were levied as a distress (2nd of July, 1841) by direction of the plaintiff for rent due 24th of June, 1841, from Stone to him. They were, at the time of the levy, in a certain field, and there they were impounded. The gates of the field had been properly secured by the officer who put in the execution, and were continued secure by him who levied the distress. On the 4th of July, the cattle were missing from the place in which they had been impounded; the gate of the field was open, and there were near it marks of the footstep of a man. The next morning the cattle were found locked up in a barn of the defendant's; and, upon his being spoken to of the difficulty in which he would probably involve him-

the king and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded had been a good and sufficient matter in law to have discharged

the said defendant or defendants against the said information, suit, or action; and the said matter shall be then as available to him or them to all intents and purposes as if he or they had sufficiently pleaded, set forth, or alleged the same matter in bar or discharge of such information, suit, or action."

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self, he said he would bring them back, but did not. The action was brought for the supposed taking of the cattle(a).

Crowder, for the defendant (*Bere* was with him)—

The plaintiff goes on the penal clause of the 2 W. & M. sess. 1, c. 5, s. 4; and therefore our plea of not guilty will open to us any evidence in defence we may think fit to offer to the jury, according to the provisions of 21 Jac. 1, c. 4, s. 4. That statute includes actions at the suit of the plaintiff alone, as well as actions *qui tam*. One branch of our defence will be, that there was a valid execution, and that the goods were in the custody of the law, and, being so, they could not be distrained for rent due by Stone. We shall be shut out of that defence if the facts ought to have been pleaded specially. Again, they have not proved their case, that any rent was due at all; and of that too we shall be entitled to take advantage if this be a penal action.

(a) Co. Litt. 476,—“If the distress be taken of goods without cause, the owner may recover; but if they be distrained without a cause, and *impounded*, the owner cannot break the pound and take them out, because they are in the custody of the law.” So in *Cotsworth v. Betteson*, 1 Ld. Raym. 104; 1 Salk. 247. In an action for pound-breach and rescuing a mare which had been distrained damage feasant, it was argued that the plaintiff had not entitled himself to maintain the action, for he had not shewn any title to the place where he alleged the mare was damage feasant; but the Court said, “The taking of the distress is but an inducement to the action, and the breach of the pound is the gist of the action; it is not necessary to

shew the cause of the distress so certainly; and Rast. Entr. 444, and all the other precedents in *parco fracto*, are in this manner.” And in *The Parrett Navigation Company v. Stower and Others*, 6 M. & W. 569, where the above cases are cited in argument, it was said by Lord Abinger, C. B., in giving judgment,—“I think the second count of the declaration is sufficient. It alleges that the plaintiffs had seized a certain barge and coals as a distress for certain tolls which where then due, and had impounded them. Being so impounded they were then in the custody of the law, and the defendants had no right to break the pound and retake them, and in so doing were wrong-doers.”

COLERIDGE, J.—I do not think that this is a penal action under the stat. of James; and I think, therefore (a), that it is admitted on these pleadings that the cattle were distrained for rent due, and that they were impounded in a good pound, and that the pound was broken; I think this last matter is part of the inducement. The only question raised is, whether the defendant did the act complained of, that is, broke the pound. You may shew, for instance, that the cattle escaped of their own accord.

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Crowder, to the jury.

COLERIDGE, J. (in summing up.)—The questions for you on this record are, First, Was the pound broken by any other than the cattle? and, secondly, if it were so, then was the defendant the person who broke it? The cattle had been impounded by law, and I think the pound was a lawful pound. His Lordship went over the facts. Lastly, it is in evidence that the defendant promised to bring back the cattle, and did not; and it is for you to say whether his subsequent detention of the distress shewed that he was the person who took it.

Verdict for the defendant.

Erle and *Butt*, for the plaintiff.

Crowder and *Bere*, for the defendant.

[Attornies—*H. Castleman*, and *Durant & Welsh*.]

(a) *Spencer* (Earl) v. *Swannell*, 3 M. & W. 154.

1842.

(Civil Side.)

BEFORE MR. JUSTICE COLERIDGE.

March 2nd.

JELLY v. BRADLEY.

Action for assault. Plea, that the plaintiff entered the defendant's close without leave and license, and that the defendant ordered him off: but he not going, the defendant molliter manus &c. Replication, de injuriâ:—*Held*, that under this plea it is not necessary for the defendant to rebut all leave and license, because that is not material to the issue, the defendant's justification being complete, if he can shew that he required the plaintiff to leave the close, and the plaintiff refused to do so, although the plaintiff had, in fact, entered at first by the leave and license of the defendant, that leave and license lasting only during the defendant's pleasure.

ACTION for assault and battery. Pleas, not guilty, and a justification that the defendant was possessed of a close, that the plaintiff without leave or license broke and entered it, that the defendant requested him to go out, which he refused to do, and then, that the defendant molliter manus &c. Replication, de injuriâ.

The defendant had laid out the close in question for building, and had formed several roads across it, the roads had not been dedicated to the public. On the day of the alleged assault, a fair was held on the close, and booths were erected thereon, by permission of the defendant, the plaintiff drove a waggon across the close, to convey coal to one of the booths; the defendant told him to go back, and on his refusing to do so, attempted with several of his men to turn the waggon off the land. This was resisted by the plaintiff, and a party of persons assisted him to push the waggon through the close: in the scuffle the plaintiff received some serious injuries.

Bompas, Serjt., and *Barstow*, for the plaintiff, submitted that the defendant, by allowing his land to be used for the fair, impliedly gave leave and license to all persons to come upon the close; and as the plea had (although unnecessarily) averred that the plaintiff had broken and entered, without the license of the defendant, a material part of the plea was disproved.

Erle and *Butt*, for the defendant, contended, that, if

before any assault was committed, the plaintiff was required to leave the close, and refused to do so, the justification was made out.

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COLERIDGE, J.—Notwithstanding the form of the second plea, I am of opinion that it will be sufficient for the defendant to shew, (in addition to the proof of possession), that he required the plaintiff to leave and that the latter refused to do so, for that will prove the material parts of the plea; and it is no objection that something else may not be proved which is unnecessarily stated, and which is not essential to a perfect justification.

Verdict for the defendant.

Bompas and *Barstow*, for the plaintiff.

Erle and *Butt*, for the defendant.

[Attornies—*Mackey*, and *Randell & Co.*]

WILTS ASSIZES—DEVIZES.

BEFORE MR. JUSTICE MAULE.

1841.
July 21st.

REGINA v. BRIDGMAN and Another.

WORTHY BRIDGMAN and Charles Bridgman were arraigned, the one as principal and the other as accessory, in a murder committed in January, 1840. A true bill had been found against them at the Summer Assizes for the county of Wilts in 1840, and the trial had been postponed to the spring of the year 1841, in consequence of the absence of a material witness, and, for the same cause, to the present assizes, and

Where the trial of prisoners had been successively postponed for two assizes, in consequence of the absence of a material witness, and the affidavit, on which application was made for further post-

ponement, stated, that the witness in question was believed to have gone to India as a soldier, so that there was not any prospect of his soon return, the Judge ordered the recognizances of the prosecutor to be discharged, and discharged the prisoners without compelling them to enter into any recognizances for their future appearance.

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Merewether now applied, on behalf of the Crown, that the prisoners might be discharged on their own recognizances.

The affidavits on which this application was made alleged the two post-ponements as above mentioned, and the cause of them; that the absent evidence was material to the conduct of the case; that all due diligence had been used to find the witness, but without success; and that the constable who was employed to apprehend him had heard and believed that he had embarked for India as a soldier.

Cockburn, for the prisoners.—These prisoners have a right to be tried upon the indictment and inquisition against them, and I believe there is no precedent for postponing a trial by reason of the absence of a material witness, when there is not any prospect that the witness will return within the jurisdiction of the Court at which the prisoners are to be tried. Suppose that these persons should hereafter wish to go to a foreign country for any length of time, it would not be fair that they should be prevented, as they would be, from doing so, by underlying their recognizances.

MAULE, J.—I think the proper course will be to discharge the recognizances of the prosecutor, and to discharge the prisoners, and then they will be liable to be taken hereafter if such course should be deemed proper.

Prisoners discharged.

Merewether, for the prosecution.

Cockburn, for the prisoners.

[Attornies, for prosecution, *Bayley & Bayley*; for prisoner, *Wm. Tanner*.]

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DEVONSHIRE ASSIZES.

BEFORE MR. JUSTICE MAULE.

CLUTTERBUCK *v.* COFFIN.

July 22nd.

DECLARATION on promises for the price of work done. The defendant, the captain of one of her Majesty's ships, offered to give the plaintiff wages beyond the usual pay from the government, if he would come on board his ship as captain's cook. The plaintiff agreed accordingly, and was by that designation (captain's cook) entered in the ship's books. The agreement was made before he joined the service, and when he was free to accept the proposal of the captain or to reject it. In an action afterwards brought by him against the captain for wages, the defendant not having pleaded the illegality of the contract, it was held, 1st, that the Court must look upon the contract as legal; and 2ndly, that being made when each party was sui juris, there was no inconsistency in the plaintiff's bargaining to receive the private pay of the defendant for filling an office, in respect of which he was also paid by the government.

Pleas: non assumpsit and payment in satisfaction. The particulars were for £41 for wages due to the plaintiff from December, 1837, to May, 1841—forty-one months. The defendant was a captain in the navy, and in command of H. M. brig *Trinculo* during the time laid in the declaration. At the commencement of that period, he engaged the plaintiff as captain's cook, at wages of £12 a year. The plaintiff was then cook on board the Liverpool steamer, which was at that time in company with the *Trinculo* at Cadiz; the first lieutenant of the *Trinculo* came on board, and engaged him, on behalf of the captain, to act as captain's cook at certain wages, beyond his pay as able seaman. The plaintiff, on these terms, went on board the defendant's ship, and was rated on the books as captain's cook. On one occasion, in July, 1838, the captain sent some fish on board, and ordered it to be stewed for his dinner. The plaintiff put the fish into the oven instead; for this he was punished, and the minute of the punishment, as appeared from the account of the serjeant of marines, was as follows:—"July 8. Captain's complaint: neglect of duty, in cooking a fish in the oven instead of stewing of it. Thirty-six lashes on the 9th."

But the warrant produced by the clerk to the Admiralty ran as follows:—"Warrant, 9th July, 1838: Whereas

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George Clutterbuck has been guilty of repeated neglect of duty, and this being the fourth time I have had occasion to find fault with him, I therefore adjudge &c. 9th July: Punished Clutterbuck for neglect of duty." Nothing was said of fish.

The plaintiff, on the next day, asked for his discharge, which was refused, and he was kept at his former duty till the ship was paid off in May, 1841, and it was proved that, on that occasion, the captain said to the plaintiff, "I am going to pay you up to the time that I punished you, but I shall pay you nothing after that." The plaintiff said, "It is very hard, there is above £30 due to me."

Crowder and Taprell for the defendant.—The plaintiff must be nonsuited. This action is brought for wages alleged to be due, in a private capacity, from the captain of one of her Majesty's ships to the plaintiff, in respect of work done for which he was at that time receiving wages from the government. They cited *Carter v. Hale* (a), *Harris v. Watson* (b), *Elsworth v. Woolmore* (c).

(a) *Carter v. Hale*, 2 Stark. 361. It was there held by Lord *Ellenborough*, C. J., that a purser's steward, on board one of his Majesty's ships, cannot recover wages from the purser upon an *implied* contract, for his services as such steward on board the ship.

It did not appear in that case, that any specific contract had ever been entered into between the plaintiff and the defendant, and Lord *Ellenborough* notices this circumstance in his judgment, and also the fact that the purser had no fund allowed him out of which such services as those, for which remuneration was claimed, were to be paid for withal.

(b) *Harris v. Watson*. Peake, 73.

(c) *Elsworth*, Executor, v. *Woolmore and another*, 5 Esp. 84. The action was brought to recover *gratuity wages*, to which the intestate was stated to have been entitled as sailmaker on board the "*Gardener*" East India ship, of which the defendants were owners. The deceased had signed articles. He was described in them as "sailmaker." The plaintiff proposed to prove, that the sum of £2 per month claimed by him was, by the settled usage of the East India Company's ships, allowed to a certain description of persons sailing on board the ships of the East India Company, such as the boatswain, painter, and

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MAULE, J.—There may be something in your argument, and you have leave to move, if you do not call witnesses to vary the facts, though I must say I think *Elsworth v. Woolmore* distinguishable from this case, and *Carter v. Hale* still more so.

Crowder, to the jury, contended that the plaintiff was discharged from being captain's cook in July, 1838, and that the captain had a right to discharge him from that private office.

MAULE, J., (in summing up), said, I do not see any evidence of dismissal, by the captain, of the plaintiff from his office of captain's cook subsequently to the flogging in July, 1838.

Verdict for the plaintiff, and the jury found that he was a captain's cook till the ship was paid off in May, 1841.

Erle and *Greenwood*, for the plaintiff.

Crowder and *Taprell*, for the defendant.

[Attornies—*Surr & Elworthy*, and *Sole*.]

sailmaker. That, exclusive of this general custom and usage, Woolmore, the defendant, who was ship's husband, had promised to pay the deceased that sum of money. It was admitted, that the wages of 2*l.* 10*s.* per month inserted in the articles had been paid.

Lord *Alvanley*, C. J., said the plaintiff must be nonsuited. It would be a fraud on the rest of the crew, if the owners were permitted by a separate contract to

give more wages to one than to another: he was of opinion that there could not be two legal contracts, that the only one allowable was that entered into by the articles and signed by the deceased.

N. B.—In the report of this case it does not appear at what time the contract was made between the deceased and Woolmore, whether before signing the articles, or after, or at the same time as the signing.

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Afterwards, in Michaelmas Term, 1841, Sir *Thomas Wilde*, Serjt., for the defendant, obtained a rule nisi to set aside the verdict. He insisted on the illegality of the contract, and that it was against the public convenience that a person holding a situation (as this of captain's cook) under the Admiralty, should be entitled to claim private remuneration for doing that duty for which he was paid by the government.

On motion to make the rule absolute,

Bompas, Serjt., was heard for the plaintiff in shewing cause against the rule, and

Channell, Serjt., for the defendant, in support of it. On the authority of *Martin* and *Smith* (a), he relinquished the objection to the illegality of the contract, as that had not been specially pleaded. For the substance of the contract, it was said by

TINDAL, L. C. J.—As we must consider the contract legal, the question is, Was there any consideration for it, and was there any service performed under it? At the time the contract was made, the plaintiff was not employed in the Queen's service. On the application of the defendant, he entered into an express engagement, and at a time when he was free to contract. There was an express contract, a good consideration, and a valuable service. The rule for a nonsuit must be discharged. So also

(a) *Martin v. Smith*, 4 Bing. N. C. 436. There the action was in assumpsit for money had and received. The facts were that the defendant took a share of £50 in a wager made by O. on an illegal horse-race, and disposed of his interest in £20 out of the £50 to the plaintiff. The defendant having received the £50 from O., who

won the wager, refused to pay the £20 to the plaintiff, who thereupon sued him for that amount in an action for money had and received:—*Held*, that the defendant could not under the general issue set up the illegality of the wager as an answer to the action.

See also Reg. Gen. H. T. 4 Will. 4, rr. 1, 3.

COLTMAN, J.—The contract was, that, in case the plaintiff entered into the Queen's service as captain's cook, the defendant would pay him something additional to his ordinary wages. As we cannot look at the illegality of this transaction under the pleadings, there is no objection to the jury's verdict.

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MAULE, J., said, with respect to the form of pleading in this case, I think the plaintiff may truly be said to have done work for the defendant; but if the declaration ought to have been framed otherwise, an amendment would have been made at the trial under the new rules, had the objection been taken then, which it is too late to take now. Then, for the substance of the matter in issue, the plaintiff enters into a contract with the defendant at a time when each was *sui juris*, quite free to contract. Had the plaintiff actually been in the Queen's service at the time, the question raised would have been different. So a man may enter into a contract with a woman while they are unmarried; but, if they should marry, they cannot afterwards contract.—And the verdict was thereupon held to be good.

BEFORE MR. JUSTICE MAULE.

BATTERSBY v. LAWRENCE and Others, Executors of J. PESMAN. July 29th.

ACTION for labour and attendance on the deceased by the plaintiff as a surgeon and apothecary, for performing surgical operations upon him, and for medicines. Pleas, Except as to £10, non assumpsit; and as to the £10, payment.

The plaintiff practised as physician and surgeon. On a case occurring in which the advice of a physician was

considered necessary as well as the aid of a surgeon, he was called in. It appeared in evidence that he had performed for his patient some services which usually are in the province of a surgeon. The plaintiff sent his bill to the executors of his patient:—*Held*, that if the jury considered that the plaintiff had done any work as surgeon, they should find a verdict for him to the amount of the value of that service.

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The malady under which the deceased laboured was dropsy; and the plaintiff claimed £46 for his services and attendance upon his patient. The plaintiff was a physician, and had also a certificate of surgeon from the Royal College, and he practised in both capacities in the town of Torquay.

One witness, J. Tanner a surgeon, stated that he alone, at first attended the deceased but the disorder increasing he recommended that further advice should be taken, and since he considered the case to be of such a nature as to require the attention of a physician, as well as that of a surgeon, he mentioned the name of Dr. Battersby, the plaintiff. The usual fee which the plaintiff received was a guinea for two visits; but he gave three attendances for a guinea if his services were demanded for any prolonged time. The operations required upon the patient were said to be puncturation, scarification, bandaging, and friction; they were operations specifically within the province of a surgeon's practice, and the plaintiff had sometimes performed them with his own hand.

Crowder and Butt, for the defendants.—According to the case of *Lipscombe v. Holmes* (a), the plaintiff would be out of Court altogether, because he is a physician as well as a surgeon; but the difference between that case and the case in chief is, that here they attempt to engraft some surgical operations upon the attendance as a physician. We admit that some work has been done by the plaintiff in the former character, but for that the executors of the deceased have already paid £10 into Court. There is no pretence for any claim for services as an apothecary, the plaintiff has not proved that he had practised as an apothecary before the year 1815; nor, if his practice commenced since that period, has he produced the proper certificate, *Allison v. Haydon* (b).

(a) 2 Camp. 441.

(b) 4 Bing. 619; 3 C. & P. 240.

MAULE, J., (in summing up).—This action is for work and labour as a surgeon and apothecary, and for surgical operations. The defendants deny that any thing is due for such services done for their testator, or at any rate they say, that not more than £10 is due. Your verdict will be for the plaintiff if you believe he has done any work for the deceased as surgeon to the amount of more than £10; but for the defendants, if what was done in that capacity was not of more value than £10, or if what the plaintiff did was not done as a surgeon; for the law is that a physician cannot maintain any action for his fees. But the plaintiff claims to recover for his services as a surgeon. If therefore his attendances have been as a physician, he cannot recover; independently of any rule of law respecting physicians. It is said that the case was a surgical case, but not so altogether, and the patient is attended by a person who is both a physician and a surgeon. It is possible, that if such a person afford attendances only as a surgeon, yet that he cannot recover at all in consequence of his double capacity; if the law be so, and if you should find a verdict for the plaintiff, the defendants ought to have leave to move to enter a verdict the other way.

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Verdict for the plaintiff.

Bere and *M. Smith*, for the plaintiff.

Crowder and *Butt*, for the defendants.

[Attornies—*Kennaway*, and *Lewis & Lewis*.]

Afterwards, in Michaelmas Term, *Crowder* moved to enter a nonsuit, or for a new trial, and the rule was refused.

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BEFORE MR. JUSTICE COLERIDGE.

March 18th.

ALFORD v. VICKERY.

Four trustees were joint landlords of a house under a deed of trust; and notice to quit was served upon the tenant, but signed by three of them only:—*Held*, that the notice was sufficient to put an end to the connexion between all the parties as landlord and tenant.

Notice to quit was given, and it expired at Lady-day, 1840: the tenant held on till Lady-day, 1841, but since the former period there had been no payment of rent, nor any other overt act to shew that a new tenancy was created. The landlord distrained for rent due at Lady-day, 1841:—*Held*, that the distress was not justifiable. The landlord ought to have sued for use and occupation.

A notice to quit is sufficiently served upon a tenant, if it can be shewn that it came to his hands before the six months previous to the expiration of his year of holding, though the notice had been served only by having been put under the door of the tenant's house.

TRESPASS.—For breaking and entering the plaintiff's house, and seizing his goods. Plea, That one James Baker held and enjoyed the premises as tenant to the defendant and three others, namely, the Hon. Newton Fellowes, Mr. Northcote, and Mr. Reed, at the yearly rent of five guineas, and that the defendant entered and distrained for a year's rent in arrear at Lady-Day, 1841. Replication, non tenuit.

There was a new assignment of trespasses on other occasions, and to them a similar plea was pleaded, justifying an entry to distrain for a year's rent due at Lady-Day, 1840. Replication, non tenuit.

The defendant, with the others mentioned in the plea, were co-trustees of a charity estate belonging to the parish of Chawleigh in Devon. Under the provisions of their trust, they appointed the plaintiff, in 1815, to be schoolmaster of the parish, and for many years he occupied the house in question (which belonged to the trustees, and the yearly rent of which they assumed to be five guineas), as part of his emoluments. He afterwards quitted the house, still continuing schoolmaster. It was then let at a public survey, at which both the plaintiff and defendant were present. James Baker became the tenant, and the rent was received by the defendant, and accounted for by him to the plaintiff up to the year 1838, when Baker refused any longer to pay rent to the defendant, alleging that the plaintiff was his landlord.

One question of fact was, whether Baker were tenant to the plaintiff or to the persons mentioned in the plea.

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The defendant distrained on Baker for the year's rent due at Lady Day, 1840; and, six months before that time the notice to quit, dated 7th September, 1839, was put under the door of the house. Baker's wife proved that the notice was received by her husband, and taken to his attorney before the 29th of September, 1839. It was also proved that Baker quitted possession on the 25th of March, 1840, but he gave up the key to the plaintiff, not to the defendant.

The notice to quit required Baker to give up the house rented by him of the four persons named in the plea, on the 25th of March then next following. It was signed by the defendant, Mr. Fellowes, and Mr. Reed, but not by Mr. Northcote. The defendants began; and at the end of their case,

Erle and *Butt*, for the plaintiff, submitted, among other things, that the plaintiff was at all events entitled to recover; for Baker, supposing him to have been tenant to the four trustees up to Lady Day, 1840, had ceased to be so on the expiration of the notice to quit, and by that notice the tenancy was put to-end on that day. After that, had Baker remained in possession as he did, the landlords might have sued him for use and occupation, but they could not distrain for rent, there being no proof of any subsequent payment of rent, or any facts from which a new tenancy at the old rent could be presumed. They cited *Jenner v. Clegg* (a), *Doe d. Aslin v. Summersett* (b).

Bere and *Rowe*, for the defendant.—The notice to quit did not determine the tenancy, for it was not signed by *all*

(a) 1 M. & R. 213.

(b) 1 B. & Adol. 135.

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the landlords, nor was it served so as to make it binding on either side. And the fact that the landlords distrained for a year's rent due at Lady Day, 1841, is evidence of their having waived the notice, even if the notice were sufficient.

Erle and Butt, for the plaintiff.—The case of *Doe d. Aslin v. Summerson* (a), decides expressly that a notice to quit by one of several joint-tenants, determines the tenancy as to all, and the plaintiff recovered there in the action upon a joint demise by them all (b).

Again, if the notice to quit determined the tenancy as

(a) 1 B. & Adol. 135.

(b) The following is a part of the judgment of the Court, as delivered by Lord *Tenterden*, C. J., in the case of *Doe d. Aslin v. Summerson*:—"Where joint-tenants join in a lease, each demises his own share, Co. Litt. 186. a, and each may put an end to that demise, as far as it operates upon his own share, whether his companions will join with him in putting an end to the whole lease or not (*Doe*, lessee of *Whayman*, v. *Chaplin*, 3 Taunt. 120); so that upon the notice to quit in this case, no doubt a third might have been recovered had there been a separate demise. But, though upon a joint lease by joint-tenants, each demises his own share, this is not the only operation of such a lease. Joint-tenants are seised not only of their respective shares, per my, but also of the entirety, per tout; Litt. s. 288. The rent reserved will enure jointly to all the lessors; Co. Litt. 47 a, 192 a, 214 a; and if any of them die, the lessee shall hold *the whole* as tenant to the survivors. Upon a joint demise by joint-tenants upon a

tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each, so long as he and each shall please, but that he holds the *whole of all* so long as he *and all* shall please; and as soon as any one of the joint-tenants gives a notice to quit, he effectually puts an end to *that* tenancy; the tenant has a right upon such a notice to give up the *whole*, and unless he comes to a new arrangement with the other joint-tenants as to their shares, he is compellable to do so. The hardship upon the tenant, if he were not entitled to treat a notice from one as putting an end to the tenancy as to the whole, is obvious; for however willing a man might be to be the sole tenant of an estate, it is not very likely he should be willing to hold undivided shares of it; and if upon such a notice the tenant is entitled to treat it as putting an end to the tenancy as to the whole, the other joint-tenants must have the same right. It cannot be optional on one side and on one side only."

to three only of the landlords, as the defendant says, and not as to all, then the issue upon non tenuit is disproved, as in *Philpott v. Dobbinson* (a).

Then, as to the service. The notice came to the hands of the tenant before Michaelmas, 1839, and was acted upon by him, and the landlords cannot now say that the service was defective.

Lastly, the landlords could not waive their notice, at their own option ; and there is no evidence of any new tenancy after Lady Day, 1840.

Bere and Rowe, for the defendant, submitted that there was evidence for the jury of a new tenancy, and also that, upon such service as that which had been proved, the landlords could not have supported ejectment. The service, therefore, was not sufficient.

COLERIDGE, J.—I am of opinion that the notice to quit put an end to the tenancy as to all the joint lessors ; and that, consequently, the relation of landlord and tenant, on the terms stated in this plea, did not exist between the four trustees and Baker after Lady Day, 1840. The distress, therefore, for a year's rent due at Lady Day, 1841, was not justifiable. I am also of opinion that the notice to quit was sufficiently served. It came to the hands of Baker before Michaelmas Day, 1839, and he acted upon it by quitting at Lady Day, 1840. It is equally clear that there is nothing which can go to the jury to shew that a new tenancy was created for the year ending at Lady Day, 1841. As to the action, therefore, I think the plaintiff is entitled to recover. The issue upon the plea to the new assignment will depend upon the question whether the

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(a) 3 M. & P. 320; 6 Bing. 104, S.C. Where the defendant avowed for an entire rent of £170, and it appeared that he had only two-

thirds of that rent as tenant in common of the reversion with another not named in the avowry, it was held a variance on *non tenuit*.

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jury think that Baker, up to Lady Day, 1840, was tenant to the trustees of this charity, or to the plaintiff.

Verdict for the plaintiff generally.

Erle and Butt, for the plaintiff.

Bere and Rowe, for the defendant.

[Attornies—*Tanner*, and *J. H. Terrell*.]

(*Crown Side*.)

BEFORE MR. JUSTICE ERSKINE.

March 17th.

REGINA v. PITTS.

If a person, being attacked, should from an apprehension of immediate violence, an apprehension which must be well grounded and justified by the circumstances, throw himself for escape into a river, and be drowned, the person attacking him is guilty of murder.

MURDER.—The indictment charged the prisoner in one count with having caused the death of the deceased by beating and wounding; in another by drowning: in other counts, the death was alleged to have been occasioned by the deceased in slipping and falling into the water, in endeavouring to escape from an assault made with intent to commit murder, and from an assault made with intent to commit robbery.

The body of the deceased was found in the river at Exeter, and it bore marks of violence, but not of violence sufficient to occasion the death, which appeared from the symptoms to have been produced by drowning. There were marks of a struggle on the ground, and the stick and gloves of the deceased were discovered at no great distance on the banks of the river, but in a place from which it was impossible that the body could have floated to the spot where it was found. The deceased had been drinking with the prisoner and another person on the previous

evening, and had been seen, at a late hour, followed by both in a suspicious manner towards his own house. When the prisoner was apprehended, the deceased's watch was found upon him, and there were marks of blood on his coat. The other person implicated in the transaction was admitted Queen's evidence, and deposed to the fact, that they two had inveigled the deceased to the water's edge; that the prisoner endeavoured to rob him; that a scuffle took place, and that the prisoner afterwards told him that he had pushed the deceased into the water.

ERSKINE, J. (in summing up).—A man may throw himself into a river under such circumstances as render it not a voluntary act; by reason of force, applied either to the body or the mind. It becomes then the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was *no* other way of escape, but that it was such a step as a reasonable man might take. Here, all the circumstances shew that, even if the deceased did throw himself into the river, it must have been from circumstances arising out of a scuffle with the prisoner or some other person, or from apprehension of further violence.

The prisoner was acquitted, but pleaded guilty to an indictment for the robbery of the watch.

F. N. Rogers, Merivale and Erskine, for the prosecution.

Bere and Merewether, for the prisoner.

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BEFORE MR. JUSTICE COLERIDGE.

March 17th.

SOUTHCOTTE v. MERRIMAN and Others, Directors of a Life Insurance Society.

In an action to recover the amount of a policy upon a life insurance, where the rules of the society stipulate that the insured shall be of sober and temperate habits it is sufficient, upon a plea denying the sober and temperate habits of the insured, for the defendants to shew that his habits were intemperate, and it is no answer to this plea, that the plaintiff prove the intemperance not to have been to such a degree as to injure the health of the insured, or to shorten his life.

THE declaration was on a policy of insurance upon the life of Peter Stoneman, made by the plaintiff at the office of the defendants, for £400, dated 2nd of October, 1839; it set out also the declaration made by the plaintiff as to his interest in the life, and as to the health and sober and temperate habits of the assured, the liability of the company, and the death of Peter Stoneman. Plea, that the declaration made by the plaintiff was not true as to the sober and temperate habits of Peter Stoneman, but that he was of intemperate and drunken habits, and so the policy was void.

For the plaintiff, it was shewn that Stoneman was a man of strong constitution; though it was admitted that he was not a man who was never intemperate, but that he would sometimes spend a day or two at once at the Somerset Arms, where he would drink five or six pints of ale in the course of the day, but that he was not systematically intemperate; that he never took enough to hurt him; that he had not the appearance of a man affected by the habitual use of liquor; and a medical witness said that Stoneman died of inflammation in the lungs, which inflammation was totally unconnected with intemperance or habits of drunkenness.

Bompas, Serjt., for defendants.—The argument on the plaintiff's side is, in effect, this: "That the office has no right to resist their claim; because, if they can shew that the man's health was good,—if his constitution remained unimpaired,—it did not matter whether the man were a drunkard or not." Our answer is, The contract stipu-

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lates that the insured shall be of sober and temperate habits. The witnesses for the defendants proved the contrary of the former evidence: that the deceased was a notorious drunkard; that he had been often turned away from his employment for this fault; some of them had seen him drink fifteen pints of cider before dinner, and he would be away for a week or a fortnight together drinking. This habit was said to have lasted up to the time of his death, and to have begun before any of the witnesses could recollect its commencement, though some of them had known him many years: all the witnesses spoke to his general drunken habits; some had been his companions, and others had seen him constantly. It was said, that he drank harder in 1839 than he had ever done; and the plaintiff himself had been heard to speak of his drunken habits, and to blame him for them.

Erle, in reply.

COLERIDGE, J. (in summing up).—The question on the record is respecting the habits of Peter Stoneman, the deceased. You have to say whether, upon the 2nd of October, 1839, and for such a reasonable time backwards as would allow of a man evincing a habit, Stoneman was a temperate man. It is said by the plaintiff's counsel that the question is, whether the deceased was intemperate to such a degree as to injure his health. I differ from that position: for the society has a right, from many motives of their own, to act upon what rules they please, and to stipulate, as in this case, that, even though a man's health be not impaired, every person whose life is insured at their office shall be a person of temperate habits. His Lordship then went over the evidence, and concluded, You ought to say, upon the weight of this evidence, whether the man, Stoneman, were of sober and temperate habits at the time of the insurance.

Verdict for plaintiff.

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Erle, Crowder and M. Smith, for the plaintiff.

Bompas, Greenwood and Cornish, for the defendants.

[Attornies—*Gillard, and Stone & Turner.*]

Afterwards, in Easter Term, the defendants obtained a rule nisi to set aside the verdict, as being against evidence.

BEFORE MR. JUSTICE COLERIDGE.

March 16th.

REGINA v. JOHN NOTT.

The defendant, a county magistrate, complained to the Bishop of Exeter of the conduct of two of his clergy, and to substantiate his charge he swore witnesses before himself, as magistrate, to the truth of the facts:—*Held*, that the matter before the Bishop was not a judicial proceeding, and therefore that the magistrate had brought himself within the enactment, 5 & 6 Will. 4, c. 62, s. 13, and that he had unlawfully administered voluntary oaths contrary to the enactment of that statute.

INDICTMENT against the defendant, a magistrate of the county of Devon, for administering voluntary oaths contrary to the statute 5 & 6 Will. 4, c. 62, s. 13 (*a*).

(*a*) Sect. 13:—"And whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received: And whereas doubts have arisen whether or not such proceeding is illegal; for the more effectual suppression of such practice and removing such doubts, be it enacted, That from and after the commencement of this act it shall not

be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: Provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or

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The first count of the indictment charged, that the defendant, being a justice of the peace, did unlawfully administer to and receive from John Huxtable a certain voluntary oath touching certain matters and things whereof the defendant had not jurisdiction or cognizance by any statute. The second and third counts were slightly varied, and the fourth count negatived the proviso of the thirteenth section of the statute. There were two other sets of similar counts, charging the defendant with administering oaths to Ann Barrow and Grace Short.

The facts were that Mr. Nott had made a complaint to the Bishop of Exeter of the conduct of two clergymen who officiated in Mr. Nott's parish. The nature of the complaint was, that one of the clergymen had played at thimble-rig, and that both had neglected the duties of the parish. The Bishop intimated to Mr. Nott, that, before he could call on the clergymen to answer the complaint, Mr. Nott must either bring before him the persons who proved the charges, or obtain statements in writing of the facts. Mr. Nott obtained statements of the facts charged from the three persons mentioned in the indictment, and swore the persons before himself, as justice of the peace, to the truth of the statements made by them. The Bishop had before appointed a day for hearing the charges, and had summoned the clergymen to attend; but his Lordship, on finding that the depositions had been thus sworn, declined to look at them; he went, however, into the charges on other evidence. It appeared that Mr. Nott was ignorant of the statute rendering the practice of administering voluntary oaths illegal.

Erle, for the defendant, contended that the enacting

punishment of offences, or touching any proceedings before either of the houses of Parliament or any committee thereof respectively, nor to any oath, affidavit, or affirma-

tion which may be required by the laws of any foreign countries to give validity to instruments in writing designed to be used in such foreign countries respectively."

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Crowder (*Bere* and *C. Saunders* were with him) submitted to the jury, that the dealing was not between the plaintiff and defendant, nor was there sufficient evidence of the warranty given, nor was the unsoundness of the animals established.

ERSKINE, J., (in summing up).—The plaintiff must make out three facts: first, the sale to him; secondly, the warranty; and thirdly, the breach. If Bryant bought the oxen for himself and sold them again to the plaintiff, then this action will not lie; but if he bought them as the agent of Kiddell, it does not signify that he did not make use of the name of his principal. Secondly, the question of warranty; That rests on the evidence of Bryant entirely; but when there is evidence of a warranty, the fairness of the price paid is a circumstance tending to confirm that evidence. If you find on these two points for the plaintiff, then the third question is, were the cattle unsound at the time of the sale? The plaintiff must prove that the beasts had some disease or seeds of disease at the time of the sale, which rendered them in some degree unfit or less fit for ordinary use. Thus it is in the case of horses: so with respect to oxen. The defendant warrants they have no disease which would prevent them from being fattened and made fit for sale to a butcher, or render them disqualified for travelling. One of the beasts died on the road from unsoundness. Did the unsoundness come on by any accidental circumstance after the sale, as taking cold or drinking cold water? if so, that is not such unsoundness as to affect this verdict: or were the symptoms referable to antecedent disease? if so, the case is made out as to that animal. For the other two bullocks, you have it in evidence, that the butcher who bought them observed their bad condition; and it is also said that they were unsound at the time of the sale on Lew Down.

The question is, are you satisfied that these beasts had the disease upon them at the time of sale?

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Verdict for the plaintiff: damages £25.

Erle and *Moody*, for the plaintiff.

Crowder, *Bere* and *C. Saunders*, for the defendant.

[Attornies—*Clowes & Wedlake*, and *Kingdon*.]

Afterwards, in Easter Term, *Crowder* moved the Court for a new trial, on the ground of mis-direction on the part of the learned Judge, respecting the subject of soundness. But the Court refused to give him a rule to shew cause, and—

PARKE, B., said—I adhere to the doctrine laid down in *Coates v. Stevens* (a), though differing from that held in *Boldero v. Brogden* (b). The word “sound” means that the

(a) *Coates v. Stevens*, 2 M. & R. 157.—Bristol, 18th Aug. 1838, Parke, B., said—“I have always considered, that a man who buys a horse warranted sound, must be taken as buying it for immediate use, and he has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that, if at the time of the sale the horse has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description; or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident, undergone any alteration of structure, that either actually does at the time or

in its ordinary effects will diminish the natural usefulness of the horse; such a horse is unsound.”

(b) *Boldero v. Brogden*, 2 M. & R. 113—Lancaster, 19 Mar. 1838. Coleridge, J., said,—“The question was, whether the horse at the time of the sale had upon him any disease which was calculated permanently to render him unfit for use, or whether the disorder which the horse then had was a mere cold, of such a nature that with ordinary care it would soon have been cured, and so cured as to leave in the animal no tendency to any recurrence of the disorder in its after life. A mere slight cold no more constituted unsoundness in a horse than it did in a human creature; neither was a horse lame within the meaning of a warranty, because at the time of

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animal is free from disease at the time he is warranted to be sound. If, indeed, the disease were not in ordinary cases of a nature to impede the natural usefulness of the animal in the purpose for which he is used, it would not be unsoundness: as, if a horse had a pimple on his skin; but if the pimple were on some part of him, so as to prevent putting on him a saddle or bridle, or other harness, the case would be different; he would then be unsound. No argument is to be admitted which is adduced from the slightness of the disease or the facility of cure; for it would be impossible to set any limit to the time of cure, though the slightness of the disorder, at the time of sale, may be a fit subject for the jury's consideration in assessing damages.

ALDERSON, B.—The only qualification of which the word "sound" is susceptible is, that the animal is sound for the purposes for which it is sold. If a horse be sold to be used in a certain way, and should be affected with any disorder which will impede his usefulness in that way, he is unsound (*c*).

the sale he might have a thorn in his foot, and so limp, if it were clear that the limping would be cured by simply extracting the thorn. The point to consider was the effect on the constitution of the animal. If the jury thought, in the present instance, the only ailment of the horse at the time of the sale

was a mere cold—such a cold as might reasonably be expected to give way to slight medical treatment, and to leave behind no seed of future disease—he recommended them to find their verdict for the defendant.

(*c*) 6 Jurist, 327.

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SPRING ASSIZES, TAUNTON, 1841.

BEFORE MR. COMMISSIONER ROGERS.

REGINA v. ALLAN.

April 9th.

JOHN ALLAN was indicted for aiding Benjamin Young, a prisoner in the gaol at Ilchester, in escaping therefrom, on Saturday, January 9, 1841. There were three counts in the indictment: two for the offence at common law, and one under the stat. 4 Geo. 4, c. 64. Benjamin Young had been taken under a *capias ad satisfaciendum* for 27*l.* 10*s.* 2*d.*, at the suit of Samuel Pryor Jackson and Richard Ainsworth. He petitioned the Court for the Relief of Insolvent Debtors for his discharge under the act; and the Court, on hearing his petition, ordered him to be discharged forthwith as to the several debts in his schedule, excepting as to a debt of 51*l.* 10*s.* 2*d.*, due to the said S. P. Jackson and R. Ainsworth, and as to a certain other debt of 64*l.* due to Joseph Smith, (the two debts amounting to more than £100); and as to them, to be discharged as soon as he shall have been in custody at the suit of the said S. P. Jackson and R. Ainsworth, and at the suit of the said J. Smith, for the period of thirteen calendar months. The debt of 51*l.* 10*s.* 2*d.* included the above sum of 27*l.* 10*s.* 2*d.*

It is a misdemeanor, indictable at common law, to aid a person to escape from custody, though he be confined under the remand of the Commissioners for the Relief of Insolvent Debtors, and not on any criminal charge.

The prisoner was undefended by counsel.

Kinglake, for the prosecution, submitted on behalf of the prisoner, before going into the merits of the case, whether the indictment would lie or not. There were two questions:—First, was Benjamin Young in such custody as that contemplated in 16 Geo. 2, c. 31, s. 1 (a), so as to

(a) 16 Geo. 2, c. 31, s. 1:—"If any person shall, from and after the 24th day of June, 1743, by any means whatsoever, be aiding or assisting any prisoner to attempt to make his or her escape from any

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make it an indictable offence to aid in his escape? Do the words, "any process whatsoever," comprehend civil process, and the process under the remand of the Court for the Relief of Insolvent Debtors, as well as criminal process? The only process, independent of the commissioner's order, under which the gaoler held Young in custody, was the *capias ad satisfaciendum* above referred to for 27*l.* 10*s.* 2*d.* The order of the commissioner did not subject Young to custody, but limited his period of confinement by directing his discharge at the end of *thirteen* months, and therefore it might be that Young was not in gaol upon any process for a debt to the amount of 100*l.* If the Court ruled on behalf of the prisoner on this point, then the second question was, whether a person in custody under civil process can be guilty of an escape, as that offence is contemplated at *common law*. It is submitted, that a person must be in custody under some criminal charge or process, otherwise his offence is not of a public character; and consequently, to aid in his escape is not an offence against the community. But he also suggested, that if any person refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice before such time as he is delivered by due course of law, he is guilty of a high contempt punishable with fine and imprisonment (*b*).

gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny, or lawfully committed to, or detained in, any gaol for treason, or any felony, except petty larceny, expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America, for the term of seven years; and in case such prisoner then was convicted of, committed

to, or detained in any gaol for petty larceny, or any other crime, not being treason or felony, expressed in the warrant of his or her commitment or detainer, as aforesaid, or then was in gaol upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of £100, every person so offending as aforesaid, and being thereof lawfully convicted, shall be deemed and adjudged guilty of a misdemeanor, for which he or she shall be liable to a fine and imprisonment."

(*b*) Hawkins' Pleas of the Crown, b. 2, c. vi; 2 Inst. 589, 590.—

Mr. Commissioner ROGERS took the opinion of ERSKINE, J., and WIGHTMAN, J., on the above case; and their Lordships held, that the prisoner was indictable for this offence at common law.

Att.-Gen. v. Sir Miles Hobert; and *Att.-Gen. v. Wm. Stroud*, Cro. Car. 209.

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SOMERSETSHIRE ASSIZES.

BEFORE MR. JUSTICE MAULE.

REGINA v. GOODING.

August 15th.

JOHN GOODING was indicted for feloniously marrying Ann Taylor, his first wife Ann Gooding then being alive.

Ball, for the prosecution, called a witness, the wife of the sexton of the parish of Bedminster, who produced an examined copy of the certificate of the marriage of John and Sarah Ann Gooding.

The Court then asked whether the prosecutor were prepared to carry the case any farther; and receiving a reply in the negative, the case was stopped, and

MAULE, J., said to the jury—It does not follow that the evidence already produced prevents the case from being proved; for evidence might perhaps be offered to explain the circumstance of this difference in the name of the prisoner's first wife, as she is described in the indictment, and as described in the marriage certificate; and even in the absence of such evidence as that, proof might notwithstanding be supplied, that the woman was known by both names; but as the counsel for the prosecution is not prepared with such proof, the case must stop.

If there be a discrepancy between the Christian name of the prisoner's first wife, as laid in the indictment, and as stated in the copy of the certificate which is produced to prove the first marriage, the prisoner must be acquitted; unless that discrepancy can be explained, or, in the absence of such proof, unless it can be shewn that the first wife was known by both names.

Verdict—Not guilty.

Ball, for the prosecution.

Cockburn, for the prisoner.

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TAUNTON.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

March 30th.

The vestry of a parish church was broken open and robbed. It was formed out of what before had been the church porch, but had a door opening into the church-yard, which could only be unlocked from the inside:—*Held*, that this vestry was part of the fabric of the church, and within the meaning of an indictment for sacrilegiously breaking and entering the church.

REGINA v. EVANS and SMITH.

SACRILEGE.—The prisoners were indicted for breaking and entering the parish church at Chard in the county of Somerset, and stealing the sacramental plate. The plate was kept in a chest in the vestry, and the offence had been committed by breaking the vestry window and gaining entrance thereby. The vestry had in old time been the porch of the church, and when the church was altered the porch was turned into the vestry-room. It had never been used for vestry purposes, but only for the robing of the clergyman, and the custody, as now, of the sacramental plate. It had a door opening into the body of the church, and there was another door opening into the church-yard; but this latter door was always kept locked in the inside, and the keyhole did not proceed through to the outside of the door.

COLERIDGE, J.—The vestry here is as much a part of the church for the purposes of this indictment as the altar or the nave (*a*).

Verdict—Guilty.

Bere and Stone, for the prosecution.*Moody*, for the prisoner Smith.*Edwards*, for the prisoner Evans.[Attornies—*Harvey*, and *Langworthy*.](*a*) See *Wheeler's case*, 3 C. & P. 585.

TAUNTON.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

1842.

The QUEEN v. ADAMS and Ten Others.

April 4th.

THE prisoners were indicted under the stat. 7 & 8 Geo. 4, c. 30, s. 8, for riotously, tumultuously, and feloniously being assembled together at &c., and then and there beginning to demolish a certain house in the parish of Walcot, in the city of Bath. The indictment concluded, "Against the form of the statute." The offence was alleged to have been committed on the 28th of June, 1841, and the indictment was preferred at the Summer Assizes at Bridgewater, August, 1841. Some of the prisoners were admitted to bail, and did not surrender till this present time.

Upon their arraignment,

Prideaux and *T. W. Saunders*, for the prisoners, submitted their right to demur to the indictment, and plead not guilty at the same time. They cited *The Queen v. Phillips and Others* (a).

The course proposed was allowed by the learned Judge.

In argument on demurrer,

Prideaux and *T. W. Saunders*, for the prisoners.—The indictment should have concluded against the form of the statutes. The offence is that set out by the 7 & 8 Geo. 4, c. 30, s. 8; but the punishment of the offence is altered by the 4 & 5 Vict. c. 56, s. 2 (b); and the effect of this

On an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for beginning to demolish, pull down, or destroy any house, &c., the jury cannot find the persons guilty, unless they think that their intention was so to destroy the house as, in fact, to leave it no house at all. No injury, however extensive, short of the actual demolition of the very walls of the building, is contemplated by the provisions of this act.

It is competent for a prisoner to demur and plead over to the facts of an indictment at the same time.

Where a statute declares an offence and awards a punishment, and by a subsequent act the punishment is altered, of the statutes."

the indictment for such offence should conclude "against the form

(a) 1 C. & Mar. 180, and the cases there cited.

(b) 4 & 5 Vict. c. 56, s. 2:—"Whereas by an act passed in the

8th year of the reign of his late Majesty King George the Fourth, intitled, 'An act for consolidating and amending the laws in England rela-

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latter act is to make the indictment bad ; for there is no punishment under the statute upon which this indictment is framed, since the judgment of death awarded by it cannot be pronounced.

Stone and Phinn, for the prosecution.—The indictment was preferred at the last assizes, before the act of 4 & 5 Vict. c. 56 came into operation. The offence is against the enactments of the stat. of 7 & 8 Geo. 4. The subsequent act, 4 & 5 Vict. c. 56, s. 2, which alters the punishment, is only for the guidance of the Court, if the prisoner should be found guilty.

COLERIDGE, J.—If you go for the statutable punishment, the indictment should conclude against the form of the statute which awards that punishment. The question is, whether, apart from the offence of the breach of a statute (c), it is any offence to violate the provisions of an act when the punishment awarded by the act has been taken away. On every principle, the indictment ought to have referred to both statutes.

The counsel for the prosecution then submitted to have judgment for the prisoner, on demurrer, and a new bill was found by the grand jury.

The riot occurred at the time of an election of members

tive to malicious injuries to property, &c. (7 & 8 Geo. 4, c. 30, s. 8), it was, among other things, enacted, That from and after the commencement of this act, if any person shall be convicted of any of the said offences, &c., such person shall not be subject to any sentence, judgment, or punishment of death, but shall, instead of the sentence or judgment in and by the said Act hereinbefore last recited, ordered to be given or awarded against per-

sons convicted of the said last-mentioned offences, or any of them respectively, be liable, at the discretion of the Court, to be transported beyond the seas for any term not less than seven years, or to be imprisoned for any term not exceeding three years."

Sect. 7:—"This act shall commence and take effect on the 1st day of October, 1841."

(c) See *Hawkins*, P. C., b. 2, c. 25, s. 4, note 2.

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to serve in Parliament for the city of Bath. The rioters were of the yellow party, and the house which they were charged with beginning to demolish was a public-house frequented by the supporters of the other interest. The house had been forcibly entered by the mob, and many of them said to the landlord, "Turn out the bloody blues, or we will have the house down." They destroyed every movable thing which they could find, and some fixtures, glasses, plates and chairs, windows and window frames; and they wrenched away the iron bars from one window, and with them some of the surrounding brickwork. On a cry raised that the police were coming, they quitted the premises.

One witness, the daughter of the landlord, said, "As far as I saw, the rioters had done all they wanted to do, and were going away. I did not suppose that they were going to pull down the very walls of the house."

Stone, for the prosecution, said, he could not carry the case further.

COLERIDGE, J., (in summing up).—We must take the words of the statute in their common sense. The words are, "if any persons shall begin to demolish, pull down, or destroy." Do you think that these men wanted to do any of these three things to the house? No intention to do injury, however great, to the movables, will bring the offence within this act. The three words, "demolish," "pull down," and "destroy," are strong terms, and hard of proof. Before you can find the prisoners guilty, you must be of opinion that they meant to leave the house no house at all in fact. If they intended to leave it still a house, though in a state however dilapidated, they are not guilty under this highly penal statute. If a man were to say, "I have pulled down my house," we should understand what he meant; the state of that house must be the state to which these people intended to reduce this inn. To have left

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off the work of devastation without interruption would lead to the inference that they did not intend to destroy the house. But, even if they were interrupted, the question is open, What was their ultimate intention? If they had been some time at their work of ruin before they were interrupted, it is for you to say, looking to the nature of the things which they have destroyed, whether their purpose was to demolish the house itself.

Verdict—Not guilty.

Stone and Phinn, for the prosecution.

Prideaux and T. W. Saunders, for the prisoners.

[Attornies—*Cruttwell & Sons*, and *Barette*.]

Respecting the construction of this statute see the charge of *Tindal*, C. J., to the Grand Jury at Bristol *Reg. v. Pinney*, 5 C. & P. 261, n.; *Rex v. Batt and Others*, 6 C. & P. 329.

BEFORE MR. JUSTICE COLERIDGE.

April 4th.

REGINA v. BISHOP.

If a defendant is bound by recognisance to appear and try his traverse, he may not by surrender to the officer avoid the payment of the fees customary on the entering of a traverse.

PERJURY.—The bill was found at the Summer Assizes, held at Bridgewater, 1841. It was traversed; and the defendant was admitted to bail more than twenty days before the Spring Assizes at Taunton, 1842; and he now offered to surrender himself both to the officer of the Court and to the gaoler, and to take his trial, but he was refused, be-

Where perjury was charged to have been committed in that which was in effect the affidavit on an interpleader rule; and the indictment set out the circumstances of the previous trial, the verdict, the judgment, the writ of fieri facias, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was obtained according to the provisions of the Interpleader Act:—*Held*, that the indictment was bad, as the affidavit did not appear to have been made in a judicial proceeding.

cause he could not pay the Court fees customary on entering and trying his traverse according to the terms of his recognisance.

Bere and Prideaux, for the defendant, submitted that he was ready in Court to take his trial; that the indictment was upon the record, and that, under the enactments 60 Geo. 3 & 1 Geo. 4, c. 4, ss. 3, 5 (a), the trial must proceed. That the statute merely insisted on the defendant pleading to the indictment, and then directed that the trial should proceed, but required no condition precedent

(a) 60 Geo. 3 & 1 Geo. 4, c. 4, s. 3.—“Where any person shall be prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, within that part of Great Britain called England, or in Ireland, having been committed to custody, or held to bail to appear to answer for such offence, twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon at such same session of the peace, session of oyer and terminer, great session, or session of gaol delivery respectively, unless a writ of certiorari for removing such indictment into his Majesty's Court of King's Bench at Westminster, or in Dublin respectively, shall be delivered at such session before the jury shall be sworn for such trial.

60 Geo. 3 & 1 Geo. 4, c. 4, s. 5.—“Where any person shall be prosecuted for any misdemeanor, by indictment at any session of the peace, session of oyer and terminer, or session of gaol delivery within that part of Great Britain called

England, or in Ireland, not having been committed to custody, or held to bail to appear to answer for such offence, twenty days before the session at which such indictment shall be found, but who shall have been committed to custody, or held to bail to appear to answer for such offence at some subsequent session, or shall have received notice of such indictment having been found twenty days before such subsequent session, he or she shall plead to such indictment at such subsequent session, and the trial shall proceed thereupon at such same session of the peace, session of oyer and terminer, or session of gaol delivery, respectively, unless a writ of certiorari for removing such indictment &c. shall be delivered at such last-mentioned session before the jury shall be sworn for such trial, any law or usage to the contrary notwithstanding.

See 55 Geo. 3, c. 50, s. 4, abolishing Court fees in certain cases; and respecting fees demanded from the defendants in *traverses*, see Dickenson's Quarter Sessions, by Talfourd, Serjt., p. 550, 4th edit., 1838.

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to the entry of his plea ; such, for instance, as the payment of the Court fees.

COLERIDGE, J.—I can only take the words of his recognisance as I find them (*b*) ; and I understand the practice is to require payment of the fees before the traverse can be entered. On the Oxford circuit, the clerk of the Crown receives a salary, and is accountable for all the fees, so that it is impossible for him to remit any of them ; and I think it far better that their payment should be insisted upon in all cases, and that the legislature should interfere to direct a compensation to the officers, if that be thought advisable.

The fees were afterwards paid.

The indictment was for perjury committed in a proceeding under the Interpleader Act ; and it set out the issues found in the Court of Exchequer between A. B. and C. D., the trial at Westminster, the verdict for the plaintiff, the judgment, the writ of *feri facias* consequent thereupon to the sheriff of Somersetshire, dated 5th June, 1841, the warrant, the seizure of the goods and chattels of C. D., and the notice on the part of Thomas Bishop (the now defendant) to the sheriff not to sell the goods so seized, but to deliver

(*b*) Form of a recognisance to try a traverse:—A. B., you acknowledge to our Sovereign Lady the Queen the sum of — ; and you, C. D. and E. F., severally acknowledge to &c. the respective sums of — and —, to be respectively levied off your goods and chattels, lands and tenements, to her Majesty's use by way of recognisance, upon condition that you A. B. shall appear at the next session of the peace, to be holden for this county (or at the next Court of oyer and terminer and general gaol delivery), to try your traverse upon this indictment, to which you have now pleaded not guilty, and

not depart without leave of the Court. Dickenson's Quarter Sessions, by Talfourd, Serjt., 4th edit., 1838.

Before he enters his traverse, the defendant, if he is not in custody, must get from the clerk of the peace at the sessions or clerk of the Crown at the assizes a record of the proceedings, and a writ of *venire facias*, which latter must be returned by the sheriff, and he must then enter his traverse and pay his fees. If he is bound by recognisance to appear and try, he cannot surrender into custody, and so avoid the payment of his fees. *Reg. v. Fry*, 1 Leach, 111.

them up to him, Thomas Bishop, the same being his property, and to which A. B. had no claim. The indictment then charged that the said Thomas Bishop, contriving and intending to injure C. D., did, in his proper person, come before Christopher Moresby, gentleman, a commissioner, &c., and produce an affidavit in writing, and swear to the truth of the matter contained in it. The affidavit, in fact, was, that the deponent having heard that the defendant C. D. had certain goods, (those seized under the fieri facias of the 5th of June), bought them and paid for them on the 1st of June. The sale and purchase were then negatived, and this was the perjury charged.

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Bere and *Prideaux*, for the prisoner, submitted that it did not appear that the affidavit was made in a judicial proceeding; there was no allegation that any application had been made under the Interpleader Act, and therefore there was not any proceeding under which perjury could have been committed (c).

Stone and *Edwards*, for the prosecution, admitted, that if the Court was of opinion that it should either be averred in terms that the affidavit was made in a judicial proceeding, or that the judicial proceeding did not already sufficiently appear on the face of the indictment, the indictment could not be supported, inasmuch as it omitted to set out the interpleader rule.

COLERIDGE, J.—The objection is fatal. For anything that appears, this was a voluntary oath, and not made in any judicial proceeding.

Verdict—Not guilty.

Stone and *Edwards*, for the prosecution.

Bere and *Prideaux*, for the prisoner.

[Attornies—*Miller*, and *Hawkes*.]

(c) 1 & 2 Will. 4, c. 58.

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BEFORE MR. JUSTICE COLERIDGE.

The QUEEN v. JOHN REED, and ELIZABETH, his Wife.

Although a person finding property, the ownership of which has not been abandoned, may not convert it to his own use, at any rate not without some endeavour to discover the owner, and although ignorance of this law will excuse none, yet, where an ignorant person found a five-pound note and appropriated it, the Court directed the jury to consider the state of the finder's mind, and ruled, that if the jury thought the person really believed the note to be her own by right of finding, the jury should not bring in a verdict of guilty on the indictment for a larceny of the note.

THE prisoner, Elizabeth Reed, was indicted for stealing a five-pound note, and her husband for receiving it.

The daughter of the prisoners and another little girl, while walking in the street at Taunton, saw a small piece of paper lying on the ground, and the other girl directed the prisoners' daughter to pick it up, which she did, and gave it to her companion. It was a five-pound note, and the prisoners' daughter, on returning home, told her mother of the circumstance, who thereupon went to the house where the other girl lived, and said to her, "Where is that note which our Mary picked up?" Upon its being given to her, she went away with it, and gave it to her husband, who converted it at once into money. When the note was missed, and inquiry was made for it, the prisoners both denied all knowledge of any of the above circumstances.

Greenwood, for the prisoners, submitted, that before criminal delinquency could be established against them, there must be a larceny, and every larceny must include a trespass; but there was no trespass here on the part of Elizabeth Reed. The old authorities in *Hale* and *Hawkins* are to the effect that, if a man lose goods and another find them, and, not knowing the owner, convert them to his own use, there is no larceny, even although he deny the finding of them, or secrete them (a). The doctrine must be taken with limitation, no doubt; and the effect of the cases may be that no man shall excuse a finding before the thing is lost; therefore, if the property be not lost, he

(a) 3 Inst. 108; 1 Hawk. c. 33, s. 2; 1 Hale, 506.

shall not excuse himself in his appropriation of it by saying he found it. See *Merry v. Green* (b).

The principle is the same which Lord Eldon held in *Cartwright v. Green* (c).

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COLERIDGE, J.—I agree with the principle entirely. If the circumstances under which property is found be such that the ownership has been abandoned, the thing is bonum vacans, and any one may take it; but if the ownership be not abandoned, the thing is not the property of the finder: if, in addition to this, the person who finds it shews no intention to find out the owner, or to return it, that person is guilty of larceny.

Greenwood, to the jury.—Before these parties can be found guilty, you must be of opinion that Elizabeth Reed, at the time she received the note from the little girl, had the intention of retaining it, knowing that she had no right to it. If she thought that it belonged of right to her daughter, as having been the *first* to pick it up, and if she took possession of it under that impression, she would not be guilty of felony; or if she knew that she had no right to it, and if no intention to keep it arose in her until she delivered it to her husband, then she is not guilty; for then the law will presume that she was acting under coercion, and, in that case, the husband is guilty of stealing, and not of receiving, and the parties must be acquitted.

(b) *Merry v. Green*, 7 M. & W. 623. A person purchased at a public auction a bureau, in which he afterwards discovered in a secret drawer a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained anything whatever:—*Held*, that if the buyer had express notice that the bureau alone and not its contents, if any, was sold to him;

or if he had no reason to believe that anything more than the bureau itself was sold, the abstracting of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use: but that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny.

(c) 8 Ves. 435; 2 Leach, 952.

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COLERIDGE, J. (in summing up).—I am not sorry this case has come here, as it affords an opportunity of setting out the law on a subject of which many people are ignorant. A man who loses anything, does not thereby lose his property in it, and the finder is bound to restore it to the owner, if possible; and if he keep it when he thinks it is only lost by the owner, it is larceny in him. If the property be found when it is abandoned by the owner, it is his own who finds it. If the property be lost, but not abandoned, and if the finder find it with intent to restore it, but afterwards appropriate it, he does not commit larceny in the *first instance*. [His Lordship then went into the facts of the case.] Ignorance of the law cannot excuse any person; but, at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind; as, if a person take what he believes to be his own, it is impossible to say that he is guilty of felony. Elizabeth Reed might think that she had a right to the note, in consequence of her daughter having picked it up; and if she have acted openly, you must say that she took the note from the other little girl in ignorance of the continuing rights of the owner. It is impossible almost to think that she supposed the owner to have intentionally abandoned the note, but yet she might have thought that her daughter, having first picked it up, had a right to it, and a right prior to that of the other girl who first saw it; and, thinking so, she might have gone and made the demand for it, as if she had said, "You have Mary's note, give it up." Under these circumstances, she could not be guilty of larceny. But then, the conduct of the parties subsequently to this is to be considered.—His Lordship went through the facts subsequent to the taking.

Verdict—Guilty.

Moody, for the prosecution.*Greenwood*, for the prisoners.[Attornies—*Pinchard*, and *Coles*.]

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NORFOLK SPRING CIRCUIT, 1841.

CAMBRIDGE ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE BOSANQUET.

REGINA v. CAIN.

LARCENY.—The prisoner was indicted for stealing a £10 promissory note, the property of William Shildrick, his master.

It appeared that William Shildrick was the treasurer of a friendly society at Cambridge, and that the prisoner was clerk to that society, and also a trustee of it, and that he had been a trustee before he became clerk, the other trustee being a person named Robert Scarr. It was proved that the rules of the society had been re-enrolled in pursuance of the statute 10 Geo. 4, c. 56, as amended by the statute 4 & 5 Will. 4, c. 40, and by the 28th rule of the society it was provided "that as soon as £10 more than is necessary for immediate use is in the box, it shall be delivered to the trustees chosen for that purpose, who shall dispose of it as the society shall direct, agreeably to the act of Parliament," (10 Geo. 4, c. 56, s. 13 (a)).

If a benefit society, enrolled under the stat. 10 Geo. 4, c. 56, as amended by the stat. 4 & 5 Will. 4, c. 40, have a treasurer and two trustees, the property of the society may in an indictment for larceny be laid to be in the treasurer by his proper name, under sect. 21 of the stat. 10 Geo. 4, c. 56, which provides that the property of such societies "for all purposes of action or suit, as well civil as criminal," should be

deemed and taken to be, and in every such proceeding where necessary, stated to be the property of the "treasurer or trustee of such society for the time being in his or her proper name, without further description;" and upon an indictment so framed one of the trustees of the society, who has stolen the money of the society, may be properly convicted of larceny.

(a) The sections of this act of Parliament, which are referred to in this case, will be found in Ch. ed. of Burn's Justice, tit. "Benefit Society."

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It appeared that it was the duty of the treasurer of the society to receive from the stewards the money paid by the members which the treasurer kept until £20 or £30 were collected, when the treasurer proposed to the society that a certain amount should be deposited in the savings' bank. It was proved that it was the duty of the prisoner, as clerk, to keep the books of the society, and as trustee, to deposit and take monies from the savings' bank ; but either of the trustees could draw out money if he brought the book. It was further proved that upon a club night previous to the 16th of January 1841, it was agreed that £10 should be paid into the bank. The prisoner as one of the trustees did not wish to take it then, but it was arranged that both the trustees should come to take the money on the following Saturday. On Saturday, the 16th of January, the prisoner came to the treasurer's house alone, not having been sent for, and said that he had made an appointment with his brother trustee to come down for the money, and that he had left him at St. Botolph's Church, whereupon the treasurer, William Shildrick, gave him the promissory note in question, and took his receipt in the following form:—

"January 16, 1841. Received of Mr. Shildrick, the sum of £10 on account of the Friendly Union Society, to be deposited in the savings' bank.

"W. Cain, Clerk."

Soon after this the prisoner told Robert Scarr, his co-trustee, that he had seen Mr. Shildrick, and all was right, and he would not take Scarr from his work.

It appeared that the account at the bank was headed thus:—

"Friendly Society Bank, Black Swan, Bridge-street, Cambridge. Trustees, W. Cain, Robert Scarr."

The prisoner admitted that he had got all the money of the society away from the bank ; and being asked by the trea-

surer what he had done with the £10 which he had let him have, the prisoner answered, "That is gone with the rest." The £10 were never paid into the bank, nor was any sum placed to the credit of the society either on the 16th of January or afterwards.

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O'Malley, for the prisoner, submitted, that as the prisoner was one of the trustees of the society, the property in this promissory note was vested either wholly or in part in him, and that, at all events, it was not the sole property of Mr. Shildrick; and even if it were, the prisoner never was his servant, however, for some purposes he might be considered as the servant of the society. By the 11th section of the statute 10 Geo. 4, c. 56, friendly societies were authorized from time to time to "elect and appoint such persons into the office of steward, president, warden, treasurer, or trustee of such society, as they shall think proper;" and the 18th section authorized the appointment of one officer, who is there styled "treasurer or trustee," who should have the disposal of the funds; and by the 21st section, that officer is the person in whom the property must be laid. And therefore, as here, the trustees were the persons who had the disposal of the surplus funds of the society, they were the persons in whom the property should be laid; but that even if this construction were unsound, the only other that could be adopted was that the property should be laid in all these officers, for the statute vested the property in the "treasurer or trustee;" and it would be absurd to say, that the property could shift from one to another from time to time.

Barker, for the prosecution.—I submit that the intent and meaning of this statute was to vest the property of the society in one officer, and one only, whether that officer be called treasurer or trustee; and that in this case Mr. Shildrick the treasurer is that person; and that, although the prisoner and Robert Scarr were appointed and called trus-

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tees for certain purposes by the society, they cannot, either jointly or severally, answer the description of the officer in whom the property is directed by the statute to be laid in indictments. If Mr. Shildrick is the person in whom the property is vested, the prisoner then only received the note as his servant.

BOSANQUET, J.—I think it very doubtful whether the prisoner can be considered as a servant ; and therefore if the jury should think that the prisoner stole the note, I shall recommend them to find him guilty of a larceny only, reserving for the consideration of the fifteen Judges the question whether the property is rightly laid in William Shildrick.

Verdict—Guilty of larceny; it being also found by the jury that the prisoner obtained the note from Shildrick on the 16th of January, with intent at the time of so doing to steal it.

Barker, for the prosecution.

O'Malley, for the prisoner.

[Attornies—*Adcock*, and *Bradley*.]

BEFORE LORD DENMAN, C. J., TINDAL, C. J., LORD ABINGER, C. B., BOSANQUET, J., PATTESON, J., GURNEY, B., WILLIAMS, J., COLEBRIDGE, J., COLTMAN, J., ERSKINE, J., MAULE, J., ROLFE, B., AND WIGHTMAN, J.

Bramwell, for the prisoner, submitted, that under the stat. 10 Geo. 4, c. 56, the property was not exclusively in Shildrick, and that the legislature in vesting the property of benefit societies in the treasurer or trustee, might mean

that, when the property was in the possession of the treasurer, it should be vested in him, and when it was in the possession of the trustee, it should be vested in him.

Warren, for the Crown.—This act of Parliament was intended to apply to a case like the present. If the property is laid to be in the treasurer that is sufficient, where the society is robbed by the trustee; and if the treasurer had robbed the society, the property would have been rightly laid in the trustee.

Bramwell, in reply.—If the doctrine contended for on the other side be correct, the property in this money would fluctuate between the treasurer and the trustee, and would not be permanently vested in either, which could hardly have been intended by the legislature.

The case was afterwards considered by the Judges, who held the conviction right.

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NORFOLK SUMMER CIRCUIT, 1841.

BEDFORD ASSIZES.

(Crown Side).

BEFORE MR. BARON ALDERSON.

July 15th.

REGINA v. BROWN.

To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove—1st,

that the constable saw a breach of the peace committed; 2nd, that there was a reasonable necessity for calling on the defendant for his assistance; and 3rd, that when duly called upon to assist the constable, the defendant, without any physical impossibility or lawful excuse, refused to do so; and in such a case it is no ground of defence that from the number of the rioters the single aid of the defendant would not have been of any use.

MISDEMEANOR.—The indictment stated that there was a riot, and that Daniel Herbert, a constable, in the execution of his duty, endeavoured to prevent the continuance of the riot and was obstructed in the execution of his duty, and that he charged the defendant to aid and assist him, which the defendant refused to do (a).

(a) As the form of the indictment may be useful in practice, we have subjoined it:—"Bedfordshire, to wit.—The jurors for our Lady the Queen upon their oath present, that heretofore, to wit, on the 9th day of February, 4 Vict., at the parish of Holcut, in the county of Bedford, divers disorderly persons, to the number of twenty and more, to the jurors aforesaid as yet unknown, then and there did unlawfully, riotously, and routously assemble and gather together to disturb the peace of our Lady the Queen, and being then and there so unlawfully, riotously,

and routously assembled and gathered together, did commit divers outrages to the great terror of all the liege subjects of our said Lady the Queen, as well inhabiting and residing, as passing and repassing there, and against the peace of our said Lady the Queen her crown and dignity; and the jurors aforesaid do further present that one Daniel Herbert, then and there being a constable of and for the county aforesaid, and in the due execution of his said office, then and there did endeavour to prevent and restrain the said persons so assembled and committing

On the part of the prosecution Daniel Herbert was called—he said, “On the 9th of February last I was a constable in the Bedfordshire rural police force; on that day I went to Holcut, in consequence of information that

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such outrages as aforesaid, from continuing to make the said riot and breach of the peace, and him, the said Daniel Herbert, being such constable as aforesaid, and so acting according to the duty of his said office, the said persons so unlawfully, riotously, and routously assembled and gathered together and disturbing the peace of our said Lady the Queen, with force and arms, did then and there violently, forcibly, and unlawfully resist and obstruct in the execution of his duty; and that he, the said Daniel Herbert, being such constable as aforesaid thereupon, being then and there on the day and in the year aforesaid in the parish aforesaid, in the county aforesaid, did in his proper person apply to one Thomas Brown, late of the parish of Newport Pagnel, in the county of Buckingham, innkeeper, being then and there present, and in her Majesty's name did then and there, on the day and in the year aforesaid, at the parish of Holcut aforesaid, in the county of Bedford aforesaid, charge and require the said Thomas Brown to aid and assist him, the said Daniel Herbert, in the execution of his office, and the preservation of the peace of our said Lady the Queen, and for securing the said persons so unlawfully, riotously, and routously assembled to disturb the Queen's peace as aforesaid, still then and there continuing to resist and obstruct the said Daniel Herbert in

the due execution of his office, in order to their being dealt with according to law: yet he the said Thomas Brown, not regarding his duty in this respect, and then and there well knowing the said Daniel Herbert was such constable as aforesaid, and so in the execution of his duty as aforesaid, to wit, on the day and in the year aforesaid, in the parish of Holcut aforesaid, in the county of Bedford aforesaid, with force and arms unlawfully, obstinately, and contemptuously did neglect and refuse to aid and assist the said Daniel Herbert, for the purpose and on the occasion aforesaid, in the manner he the said Thomas Brown was requested, charged, and commanded to do, as aforesaid, or in any other manner whatever, contrary to his duty in that behalf, in manifest contempt of our said Lady the Queen and her laws, to the great hinderance of justice, to the evil example of others in like manner offending, and against the peace of our said Lady the Queen her crown and dignity.

Second Count.] And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the day and year aforesaid, in the parish of Holcut aforesaid, in the county of Bedford aforesaid, the said Daniel Herbert being then and there such constable as aforesaid, and in the due execution of his office, endeavouring to prevent and restrain the said persons so assembled and gathered

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a prize fight was going to take place there; I found about four hundred persons assembled; there were stakes set and two rings formed with ropes; in the centre I saw two men in fighting attitudes, and other men behind each; there were twenty or thirty persons between the inner and outer ropes, and all the rest outside; I endeavoured to get inside the ring, to take the men who were fighting into custody; I was prevented by the persons who were between the two rings, and there was a shouting of 'Keep him out;' I wore my policeman's uniform and shewed my staff: I called out that I was a police constable; Mr. Cautley went with me to the defendant, who was present; Mr. Cautley mentioned his name to me: I said to the defendant, 'Mr. Brown, I charge you in the Queen's name to aid and assist in quelling this riot;' the defendant said that he could not, as he had his horses to take care

together, and committing such outrages as aforesaid, from continuing to make the said riot and breach of the peace, in manner aforesaid, did then and there on the day and year aforesaid, at the parish of Holcut aforesaid, in the county of Bedford aforesaid, in his proper person apply to one Thomas Brown, late of the parish of Newport Pagnel, in the county of Buckingham, inn-keeper, he the said Thomas Brown being then and there present, and in her Majesty's name did then and there on the day aforesaid, in the year aforesaid, at the parish of Holcut aforesaid, in the county of Bedford aforesaid, charge and require the said Thomas Brown to aid and assist him the said Daniel Herbert in the execution of his duty, and in the preservation of the peace of our said Lady the Queen; and although the said Thomas Brown then and there well knew, that he the said Daniel Her-

bert was such constable as aforesaid, and that he was so in the execution of his said office, yet the said Thomas Brown, not regarding his duty in that behalf, on the day aforesaid, in the year aforesaid, at the parish of Holcut aforesaid, in the county of Bedford aforesaid, with force and arms unlawfully, obstinately, and contemptuously did neglect and refuse to aid and assist the said Daniel Herbert for the purpose and on the occasion aforesaid, in the manner he the said Thomas Brown was charged and required to do as aforesaid, or in any other manner whatever, contrary to his duty in that behalf, in manifest contempt of our said Lady the Queen and the laws, to the great hinderance of justice, to the evil example of others in like manner offending, and against the peace of our Lady the Queen her crown and dignity."

of; the defendant was then sitting on the box of a carriage which had four horses and was driven by postilions; the defendant had not the care of any horse; I charged several other persons to assist me, but I received no assistance from any one; the fight continued a long time after this; I saw Mr. Smith, who is a county magistrate; I assisted him in endeavouring to stop the fight; I took several persons into custody, but they were all rescued; I saw several acts of violence committed, and I saw Mr. Smith struck on the hat and a bottle thrown at him."

In his cross-examination this witness said, "The people demanded my warrant; I said I wanted none, as I was a policeman; they said it was of no use my coming without a warrant, and that I had better go home; they tried to persuade me to leave. The defendant was on the dickey of a carriage and four, when I charged him to assist me, and when he said he had to mind his horses; he did nothing to assist me; nobody helped me, and the parties who were fighting went on and finished the fight; I recollect that Mr. Smith came up about three quarters of an hour after I had charged the defendant to assist me."

This evidence was confirmed by that of Mr. Cautley, and no witness was called for the defendant.

Byles, for the defendant.—I submit that the defendant is not liable to be convicted on this indictment. He was prevented from assisting the constable by inevitable necessity. He could not leave his horses; and besides the defendant could have rendered no assistance that would have been of any avail in such a disturbance as this was, among four or five hundred people.

ALDERSON, B., (in summing up).—The offence imputed to the defendant consists in this—that Herbert being a constable, and there being a breach of the peace actually committing under his own view, he called upon the defendant to assist him in putting an end to it, and that he

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without lawful excuse refused so to do. It is no unimportant matter that the Queen's subjects should assist the officers of the law, when duly required to do so, in preserving the public peace; and it is right that the state of the law should be known, and that all parties violating the duty which the law casts upon them should be fully aware of the very serious risk they ran in case of refusal. It is necessary you should be satisfied of three particulars—first, that the constable actually saw a breach of the peace committed by two or more persons. It is clear that all prize-fights are illegal, and that all persons engaging in them are punishable by law. The constable, therefore, saw parties breaking the law; and if a breach of the peace is in the act of being committed in the presence of a constable, that constable is not only justified but bound to prevent it, or put a stop to it if it has begun, and he is bound to do so without a warrant. Secondly, you must be satisfied that there was a reasonable necessity for the constable Herbert calling upon other persons for their assistance and support; and in this case there is no doubt that the constable could not by his own unaided exertions have put an end to the combat. Lastly, the prosecutor must prove that the defendant was duly called upon to render his assistance, and that, without any physical impossibility or lawful excuse, he refused to give it. Whether the aid of the defendant, if given, would have proved sufficient or useful is not the question or the criterion. Every man might make that excuse, and say that his individual aid would have done no good; but the defendant's refusal may have been and perhaps was the cause of that of many others. Every man is bound to set a good example to others by doing his duty in preserving the public peace.

Verdict—Guilty (a).

(a) There were also other indictments against three other persons, for similar refusals to assist the police on the same occasion.

B. Andrews and Gunning, for the prosecution.

Byles and O'Malley, for the defendant.

[Attornies—*Green*, and *Lucas & Powell*.]

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The defendants in those cases with- drew their pleas of not guilty and pleaded guilty; and the defend- ants in the four cases were each sentenced to pay a fine of forty shillings, and to find sureties for their good behaviour.

MIDLAND SUMMER CIRCUIT, 1841.

WARWICK ASSIZES.

BEFORE MR. BARON GURNEY.

REGINA v. EWINGTON.

PERJURY.—The first count of the indictment stated, that Ambrose Prichard carried on the business of a builder, and that upon the 16th of October, 1837, he was indebted to William Bartlam in the sum of £100 and upwards; and that on that day he committed an act of bankruptcy; and that upon the 19th of October a fiat issued against him on the petition of Bartlam. The indictment then proceeded to aver the authority to the commissioners given by the fiat; that they qualified; that they adjudicated Ambrose Prichard to be a bankrupt; and that in the prosecution of the fiat it became and was material to inquire into the

Commissioners acting under a fiat of bank- ruptcy adjudicated A. to be a bankrupt, and afterwards B. was examined before them touching the estate of A., and gave evidence which was al- leged to be false; B. being indicted for per- jury, it appear- ed on the trial that the peti- tioning cre-

ditor's debt, on which the fiat had issued, was not of sufficient amount; but it also appeared that A. owed other debts which might have been substituted for the petitioning creditor's debt by order of the Lord Chancellor, under section 18 of the stat. 6 Geo. 4, c. 18, so as to have rendered the fiat valid, but that no such order had been made:—*Held*, that under these cir- cumstances B. could not be guilty of perjury on this his examination.

But *semble*, that if B. had been examined by the commissioners on the preliminary proceed- ings before them to ascertain whether A. should be adjudged a bankrupt or not, B. might have been guilty of perjury even though there had been no good petitioning creditor's debt.

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estate and effects of Ambrose Prichard, and to ascertain whether certain indentures of lease and release, bearing date respectively the 3rd and 4th days of July, 1837, made between Ambrose Prichard, of the one part, and James Prichard, of the other part, whereby Ambrose Prichard did direct, limit and appoint, grant, release and confirm, unto James Prichard a certain piece of land, &c., were a bonâ fide transaction, and whether the said indentures of lease and release were really and truly executed on the days of the date thereof. And that at a meeting of the commissioners, upon the 31st of January, 1838, the defendant appeared before them as a witness and was sworn. And that he knowingly, falsely, and corruptly did say, depose and swear, that he was the attesting witness to the deeds produced, dated the 3rd and 4th days of July, 1837. That they were executed upon the 4th day of July. That he believed the stamps (meaning the stamps affixed to the said deeds) were purchased at Rousham's. That they (meaning the indentures) were engrossed about the latter end of June or beginning of July, and that he could not tell when the stamps were purchased of Rousham. Perjury was assigned upon each of these several statements.

The 2nd count was in a more general form: It stated, that upon the 31st of January, 1838, the defendant personally appeared before three of the commissioners, "named and authorized in and by a certain fiat of bankruptcy duly issued, and then and there in prosecution against the said Ambrose Prichard," touching and concerning the execution of certain indentures of lease and release and appointment, bearing date respectively the 3rd and 4th days of July, 1837, and made between the said Ambrose Prichard, of the one part, and the said James Prichard, of the other part (describing the deeds as in the first count), the said three commissioners having competent power to examine the defendant in that behalf; and that it became and was material to inquire into the estate and effects of the said Ambrose Prichard, and to ascertain whether the said inden-

tures of lease and release were a bonâ fide transaction, and whether they were really and truly executed, and delivered on the said 3rd and 4th days of July. And that the defendant then and there appearing at this meeting of the commissioners, was in due form of law sworn that he would make answer, &c., the said commissioners having competent power and authority to administer the oath; and that he did falsely &c. swear [the same as in the first count, the assignments of perjury being also the same].

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It appeared in evidence that Ambrose Prichard, a builder at Leamington, being insolvent, applied to the defendant, who was an attorney residing in the same place, for his advice; and that Ambrose Prichard disclosed the state of his affairs to the defendant, and informed him that he was insolvent; that he was indebted to his brother James in the sum of £30 or £40; and that he had leasehold property which was mortgaged but not to its full value. It further appeared from the evidence of Ambrose Prichard, that the defendant suggested to him the granting a mortgage to his brother James on this property for £200, that he should become a bankrupt, and that this would furnish the means of working the commission. It further appeared, that the deeds were prepared by the defendant, and the stamps purchased by his direction of a person of the name of Rousham, in the early part of the month of September 1837, and that the deeds were executed on or about the 4th of that month, but they were ante-dated to the 3rd and 4th of July. It appeared further, upon the cross-examination of the bankrupt, that the debt due to the petitioning creditor Bartlam was much less than £100; but it also appeared that there were two other creditors, to each of whom he owed more than £100; therefore, under the 18th sect. of the stat. 6 Geo. 4, c. 16 (a), the Lord Chancellor might on applica-

(a) By which it is enacted, "That debts of the petitioning creditor or if after adjudication the debt or creditors, or any of them, be found

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tion have directed the substitution of a good petitioning creditor's debt for Bartlam's; but that in fact this had not been done.

Hill, for the defendant.—I submit that the defendant is entitled to be acquitted on the first count of this indictment, inasmuch as the averment, that Bartlam was a creditor to the amount of £100, is not only not proved but disproved; and the same objection also applies in substance to the second count, as it is stated in that count that the fiat *duly* issued, which it could not unless the petitioning creditor's debt was sufficient to warrant the fiat, which it was not, being under £100. The second count is, as I submit, also bad, because it does not aver that there was any petitioning creditor's debt or any act of bankruptcy. In the case of *Rex v. Jones (a)*, which was an indictment for a conspiracy to conceal a part of a bankrupt's personal estate, the indictment stated that a commission of bankruptcy was "duly awarded and issued" against E. O. Jones, by virtue of which the commissioners adjudged him a bankrupt; and the indictment then went on to charge, that the defendants conspired to conceal a part of his personal estate: but the Court of King's Bench held that the indictment was bad, as it did not allege that there had been a trading by Jones, a petitioning creditor's debt, and that he became bankrupt (*a*). In the case of

insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid. *See Arch. B. L. 74.*

(a) 4 B. & Ad. 345.

(b) In that case Mr. Justice *J. Park* said: "This indictment ought to have shewn a conspiracy to do an unlawful act, or to do a lawful act by unlawful means. Now it does not state enough to shew that the defendants conspired to do any unlawful act; it ought to have alleged not merely an issuing of a commission of bankrupt, but that there had been a trading by Jones, and a petitioning creditor's debt,

Rex v. Walters (a), which was an indictment against a bankrupt for concealing his books, the indictment stated the trading, the petitioning creditor's debt, and the act of bankruptcy. I submit also, with respect to both counts of the indictment, that they are bad, because it is not averred in either of them, that it was material that the date of these deeds should have been truly stated by the defendant, and inasmuch as the whole transaction with James Prichard was concerted in fraud, the deeds would not have been more operative if dated on the 4th of July, than if they were dated on the 4th of September; and another objection is, that in neither of the counts of the indictment is it expressly averred, that any such deeds ever were in existence.

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Balguy, for the prosecution. In the case of *Rex v. Punshon* (b), Lord *Ellenborough*, C. J., intimated an opinion that, on an indictment against a bankrupt for perjury before the commissioners in passing his last examination, it was necessary to give strict evidence of the trading, petitioning creditor's debt, and act of bankruptcy. But in the case of *Rex v. Raphael* (c), Mr. Justice *Abbott* held that, on an indictment against a third person for perjury committed before commissioners of bankrupt, their declaration that the party is a bankrupt is sufficient.

and that he became bankrupt. Without such allegations the indictment would clearly have been insufficient under the statute 5 Geo. 3, c. 30; and then that reduces it to the question, whether an offence is charged within the statute 6 Geo. 4, c. 16. I think it is not."

(a) 5 C. & P. 138.

(b) 3 Camp. 96.

(c) Tried at the Devon Sp. Ass., 1818, not reported, but mentioned in Mr. Serjt. *Manning's* index to the *Nisi Prius* Reports, p. 232. The learned Serjeant mentions the

cases of *Rex v. Punshon* and *Rex v. Raphael*, in the following terms:—" *Semble*, that on an indictment for perjury committed by a bankrupt in passing his last examination, it is necessary to go into strict proof of the bankruptcy. *Rex v. Punshon*, 3 Camp. 96—*Ellenborough*, C. J. 1811. But on an indictment against a third person examined before the commissioners, their declaration that the party is a bankrupt is sufficient. *Rex v. Raphael*. *Abbott*, J., Devon Sp. Ass., 1818."

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GURNEY, B.—I will reserve all the points for the consideration of the Judges.

Verdict—Guilty.

Balguy and Hayes, for the prosecution.

Hill and *W. T. S. Daniel*, for the defendant.

[Attornies—*Sanders*, and *Ewington*.]

Nov. 13th.

BEFORE LORD DENMAN, C. J., TINDAL, C. J., LORD ABINGER, C. B., PARKE, B., GURNEY, B., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., ERSKINE, J., MAULE, J., ROLFE, B., AND WIGHTMAN, J.

Hill, for the defendant.—The first question is, whether the defendant could commit perjury before these commissioners of bankrupt, as there was no good petitioning creditor's debt; and there is in the present case not only no proof of a good petitioning creditor's debt, but there is proof that the petitioning creditor's debt did not amount to £100. It has been said that the Lord Chancellor might make the fiat good by ordering another debt to be substituted. But the Lord Chancellor has made no such order, and the fiat is therefore bad.

LORD ABINGER, C. B.—You cannot dispute the authority of the commissioners to take the preliminary proceedings under the fiat, to ascertain whether the party should be adjudged a bankrupt or not. They were authorized to do that by the fiat of the Lord Chancellor; but you say that, if there was no good petitioning creditor's debt, the commissioners had no authority to inquire and examine witnesses as to the bankrupt's property.

Hill.—A case might occur where a party might sue out

a fiat who had no debt at all, and perhaps the Lord Chancellor would not substitute another petitioning creditor's debt, although the bankrupt might owe debts to a sufficient amount; indeed, I am told that the practice is, where a bankrupt has brought an action, and there is an application to substitute another petitioning creditor's debt, for the Lord Chancellor to grant the order without prejudice to the action.

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Lord DENMAN, C. J.—Mr. Hill, we need not trouble you further.

The case was considered by the Judges, who held the conviction wrong.

NORTHERN SPRING CIRCUIT, 1841.

DURHAM ASSIZES.

BEFORE MR. JUSTICE MAULE.

REGINA v. ATKINSON.

FORGERY.—The prisoner was indicted for forging and uttering a certain instrument, with intent to defraud Jonathan Backhouse and others. The indictment contained eight counts, of which the third, sixth, seventh, and eighth only became material. The third count charged the prisoner with forging and uttering an "acquittance and receipt for money, to wit, for £85;" it was proved, that J. M. had paid £85 into the D. bank, and had taken an accountable receipt for that amount; and that the course of dealing at the D. bank was to treat the accountable receipt with the depositor's signature on the face of it as an order for the payment of the money deposited and interest; and that the prisoner went to the D. bank with the receipt that had been given to J. M., and having written the name of J. M. on the face of it he delivered it to the bankers, who paid him £85, and also 2*l.* 17*s.* 6*d.* for interest. The prisoner was convicted, and the fifteen Judges held the conviction right.

On an indictment for forging and uttering a "warrant and order for the payment of money, to wit, a warrant and order for the

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soner with feloniously forging "a certain *warrant and order for the payment of money, to wit, a warrant and order for the payment of £85,*" with intent to defraud, &c. The sixth count differed from the third, in describing the instrument forged as an "*acquittance and receipt for money, to wit, for £85.*" The seventh and eighth counts were for uttering forged instruments described as in the third and sixth counts.

It appeared that a person named John Mann, in the month of June, 1839, had deposited the sum of £85 in the hands of Jonathan Backhouse and others, who constituted the Darlington Bank at Stockton, and that on that occasion he received from the Bank an accountable receipt in the following form:—

This receipt not transferable.

No. F. 266, Darlington Bank, Stockton,
 12th 6 M., 1839.

Received of John Mann,
 Eighty-five Pounds
 to his credit.

For Jonathan Backhouse & Co.
 Frederick Backhouse.

£85.

Entered, F. B.

It further appeared that in the month of October 1840, the prisoner, having this receipt in his possession, went to the bank, and representing himself to be John Mann therein mentioned, wrote the words "John Mann" on the face of the receipt and delivered it to the bankers, who paid him the sum of 87*l.* 17*s.* 6*d.*, being the amount mentioned in the receipt with interest. It further appeared that interest by the course of dealing between the bankers and their customers was payable on their accountable receipts, and that the bankers on having a receipt delivered back to them, with the name of the party who had deposited written upon it by him, treated it as an order for the

payment of the amount deposited with the interest then due, and paid such amount and interest accordingly.

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Grainger and *Otter*, for the prisoner, objected that on this evidence the counts above specified were disproved, that the document itself, independently of the evidence, had no meaning, and that the evidence shewed it to be an order or warrant, not for £85, as stated in the counts, but for 87l. 17s. 6d.

Knowles and *W. S. Grey*, for the prosecution, submitted that it was not necessary to state the amount at all, and that being stated under a *videlicet*, it need not be proved precisely. They cited the case of *Rex v. Johnson* (a).

MAULE, J.—I shall reserve the point for the consideration of the fifteen Judges.

Verdict—Guilty.

Knowles and *W. S. Grey*, for the prosecution.

Grainger and *Otter*, for the prisoner.

[Attornies—*Pullman*, and *Marshall*.]

(a) 3 M. & S. 539. In that case the prisoner was indicted for embezzling bank-notes, which were described in the indictment as "divers, to wit, nine bank-notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of £9, and of the value of £9." It was objected that the notes were not sufficiently described. The Court held the description to be sufficient; and Lord *Ellenborough* said, "If bank-notes be recognised by that description in the act of Parliament, the indictment has done enough in laying them under such a description; but it goes

further, and adds, unnecessarily perhaps, 'for the payment of money,' and moreover gives their amount in number and value;" "and Mr. Justice *Bayley* said, "It appears to me that bank-notes is a sufficient description of the thing embezzled. Many acts of Parliament have described them as bank-notes, and no otherwise; therefore I must take it that bank-notes is in general a sufficiently certain description of this chattel. If that be so, is it necessary to go farther in this indictment, and state of what particular value each note is? I think not."

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In the ensuing term the case was considered by the fifteen Judges, on the question, "whether the evidence supported the 3rd, 6th, 7th, and 8th counts, or either of them," and their Lordships held the conviction right.

YORKSHIRE ASSIZES.

BEFORE MR. BARON ROLFE.

REGINA v. HENDERSON and BARLOW.

An acquittal of an offence charged as a larceny cannot be pleaded in bar to an indictment for the same offence charged as a false pretence.

Seemle, that obtaining money by the false representation of an existing fact, the party making the representation then knowing it to be false, is an obtaining money by false pretences within the stat. 7 & 8 Geo. 4, c. 29, s. 53.

An indictment for false pretences against H. and B. charged that F. P. was possessed of a mare, and H. of a horse, and that H. and B. falsely pretended to F. P. that B. "was then and there possessed of a certain sum of money, to wit, the sum of £12," and that if F. P. would exchange his mare for H.'s horse, B. was willing and ready to purchase the horse of F. P. and give him £12. for it; "whereas in truth and in fact the said J. B. was not then and there possessed of the said sum of £12," and was not then and there ready and willing to purchase the said horse:—*Held*, that the indictment was bad, as it did not aver that the defendants *knew* that B. was not possessed of £12.

FALSE PRETENCES.—The indictment charged that Francis Pawson was possessed of a certain mare, and that the defendant Henderson was possessed of a certain horse, and that the defendants did falsely pretend to Francis Pawson, "that he, the said Jeremiah Barlow, was then and there possessed of a certain sum of money, to wit, the sum of £12;" and that if Francis Pawson would exchange his mare for the defendant Henderson's horse, the defendant Barlow was willing and ready to purchase the horse of Francis Pawson, and pay him £12; by means of which false pretences the defendants obtained the mare from Francis Pawson, with intent to defraud him of the same; "whereas, in truth and in fact, the said Jeremiah Barlow was not then and there possessed of the said sum of £12, and was not then and there ready and willing to purchase the said horse of him the said Francis Pawson, and was not then and there ready and willing to pay the said Francis Pawson the said sum of £12."

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The defendants pleaded a plea of *autrefois acquit*, which stated that at the now present general gaol delivery for the county of York, the defendants were indicted for stealing a mare of Francis Pawson, and were acquitted; and the plea went on to aver the identity of the defendants, of Francis Pawson, and of the mare; and that the taking in fact of the mare in the former indictment mentioned, and the obtaining in fact of the mare in the present indictment, were one and the same, and that they never obtained any other mare from Francis Pawson; "and that the larceny to which the said last-mentioned obtaining of the said mare would amount, if, upon the trial of the said Robert Henderson and Jeremiah Barlow on the indictment to which they are now pleading, it should be proved that they obtained the said mare in any such manner as to amount in law to larceny, and the said larceny, of which the said Robert Henderson and Jeremiah Barlow were so indicted and acquitted as aforesaid, are one and the same larceny, and not other or different larcenies." To this plea there was a demurrer, and joinder in demurrer.

Pashley, in support of the demurrer, submitted, that the plea was good by reason of the proviso contained in the 53rd section of the stat. 7 & 8 Geo. 4, c. 29, by which it is provided, that if on the trial of an indictment for false pretences it shall be proved that the defendant obtained the property in such a manner as to amount to a larceny, he should not be, by reason thereof, entitled to be acquitted of the misdemeanor. He also submitted, that the indictment was bad, as the only pretence charged, which related to an existing fact, was the pretence that the defendant Barlow was possessed of £12, and with respect to that there was no averment that the defendants or either of them *knew* that Barlow had not £12.

Wortley, for the prosecution, submitted that the plea

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was bad, as the defendants could not have been convicted of a misdemeanor on the former indictment, and that the present indictment was sufficient, as it stated that the defendants obtained the mare by a pretence which was averred to be false, and that judgment therefore ought to pass against the defendants as on a conviction (a).

ROLFE, B., reserved the points for the consideration of the fifteen judges.

Baines and *Wortley*, for the prosecution.

Pashley, for the defendants.

[Attornies—*Whitfield*, and *J. Badger*.]

May 1st. BEFORE LORD DENMAN, C. J., TINDAL, C. J., LORD ABINGER, C. B., PARKE, B., ALDERSON, B., PATTESON, J., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., ERSKINE, J., ROLFE, B., AND WIGHTMAN, J.

Pashley, for the defendants.—I submit that this plea is good, because the defendants might, upon this indictment, be convicted of larceny under the proviso contained in the 53rd section of the stat. 7 & 8 Geo. 4, c. 29, although they have been acquitted of that very larceny upon another indictment. This case is not like any other that has occurred, as this proviso is an anomaly, and unlike anything before known in the law.

(a) In the case of *Rex v. Josiah Taylor*, 5 D. & R. 422, it was held that a judgment against a defendant on demurrer, in a case of misdemeanor, is final, and that the defendant is not entitled to answer over even if the demurrer conclude

with a prayer of judgment of respondeas ouster. In cases of felony, it seems that the judgment against a prisoner on a demurrer is not final. But as to this see the judgment of *Abbott*, C. J., in the case of *Rex v. Josiah Taylor*.

ALDERSON, B.—Must not this plea of *autrefois acquit* fail, because the defendants, on the former indictment, were never in jeopardy as to the misdemeanor?

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PARKE, B.—Suppose that this indictment for false pretences does, as the law at present stands, charge two offences in the alternative, that is, the stealing of the mare, or the obtaining the mare by false pretences—this plea at the most answers one of the alternatives only; for if the obtaining of the mare was not a felony, the plea is certainly no answer to that.

Pashley.—If then the defendants had been convicted of horse-stealing on the first indictment, and had been transported for ten years, they might at the end of that time be indicted for the same offence, as a false pretence by an indictment in the same form as the present, and yet could not plead *autrefois acquit* if the present plea cannot be sustained.

ALDERSON, B.—That is the difficulty.

ROLFE, B.—And that difficulty occurred to me at York.

ERSKINE, J.—There is in this plea no allegation that the defendants did in fact steal this mare.

Pashley.—The plea only need shew that the party is twice put in jeopardy.

ALDERSON, B.—How does it shew that they have before been in jeopardy for this misdemeanor?

PATTESON, J.—Probably the first acquittal was on the ground, that the offence did not amount to a felony.

Pashley.—I submit that these defendants were in jeo-

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pardy for the felony on the first indictment, and that in one state of circumstances they would be in jeopardy for the felony on the present indictment. I submit further, that the present indictment is bad, because it does not shew a sufficient false pretence. With the exception of the statement that Barlow was possessed of £12, the pretence does not relate to any fact at all.

PARKE, B.—There is a false representation of an existing fact.

Pashley.—If your Lordships should decide, that a false representation of an existing fact is a false pretence within this act of Parliament, a very large class of cases would come within the scope of that decision.

PARKE, B.—In the case of *Reg. v. Parker (a)* I left it to the jury to say, whether the defendant had falsely represented that he had an account at the bank of Stuckey & Co. The jury found the representation to be false, and the Judges held the conviction right, as it was the false representation of an existing fact.

Pashley.—In the case of *Rex v. Wheatley (b)* it is laid down that the selling an unsound horse, affirming him to be sound, is not a criminal offence; and in *Rex v. Codrington (c)*, where a party had professed to sell a reversionary interest in property, and the vendee took the usual covenant for title, it was held that the party could not be convicted of obtaining the purchase-money by false pretences, although he had in fact previously sold his interest in the property to another person, and yet, in each of those cases, there must have been a misrepresentation of an existing fact. Another objection to the present indict-

(a) 7 C. & P. 825.

(b) 2 Burr. 1128.

(c) 1 C. & P. 661.

ment is, that there is no averment of any scienter. The indictment does not charge that the defendants, or either of them, *knew* that the defendant Barlow had not the money, nor does it even charge that the defendants did *knowingly* falsely pretend that the defendant Barlow had not this sum of £12.

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ERSKINE, J.—He might have had the money five minutes before, and have got his pocket picked.

Pashley.—The prosecutor himself might have picked the pocket of Barlow five minutes before. In the case of *Wickham v. The Queen* (a) which was a case of false pretences, in which the indictment charged that the defendant was a captain in the East India Company's service, and that "a certain promissory note" produced by the defendant, was a good and valuable security, it appears to have been conceded by Sir *F. Pollock*, who was counsel for the Crown, that it was essential with respect to that part of the pretence which related to the note, to aver that the defendant *knew* that it was not a good and valuable security, and in that case Lord *Denman* says, "I am of opinion that the two pretences in this indictment must be taken together, and as the pretence charged with respect to the promissory note, which it is not even stated that the prisoner *knew* to be worthless, is insufficient, the indictment is not sustainable."

LORD ABINGER, C. B.—This is clearly a good objection.

PARKE, B.—All that we can say is, that the Judge who goes the next northern circuit will give judgment for the defendants, on the ground that this indictment is bad.

(a) 2 P. & D. 333.

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H. employed J. L. to do work for him. J. L. had a partner named S., who took no active part in the business, of which H. was aware. J. L. asked for payment for the work, and H. paid him by a forged bill of exchange, knowing it to be so. J. L. indorsed the bill in his own name only, and gave it to his partner S., who afterwards indorsed it with his own name, and paid it away. H. was convicted of the uttering on a count which laid an intent to defraud J. L., and the Judges held the conviction right.

FORGERY.—The prisoner was indicted for forging, and uttering a bill of exchange with intent to defraud John Leadbitter.

The forgery and the uttering of the bill were clearly proved; but, with respect to the intent to defraud, it appeared that John Leadbitter had been employed by the prisoner, then the owner of a mill, to make a mill-dam, and that Leadbitter had a partner named Stansfield, who, however, took no active part in the business, although he was known to be a partner by the prisoner. It was proved that Leadbitter, who had superintended the work, applied to the prisoner for payment: that the prisoner paid Leadbitter money on account; and afterwards, instead of making a further money payment, gave him the bill in question indorsed by himself, he (Hanson) being the payee. The partner, Stansfield, was not present when the bill was so given. It was further proved, that Leadbitter indorsed the bill in his own name only, and afterwards delivered it to Stansfield, asking him if he could make any use of it, and that Stansfield afterwards paid it away, indorsing it also with his own name.

Wilkins, for the prisoner, submitted, that Messrs. Leadbitter and Stansfield being shewn to be partners, and it being shewn, also, the prisoner knew that they were so, the intent of the prisoner must be taken to be the legal consequence of his own act, which was the defrauding of the two partners, and that there was, therefore, a variance between the intent proved, and the intent laid in the indictment.

Pashley, for the prosecution.—The intent of the prisoner is a question for the jury, and on the facts proved the jury may infer that the prisoner intended to defraud Mr. Lead-

bitter alone, with whom alone he had dealings, and even if he did also intend to defraud both the partners, he might be not the less guilty of intending to defraud the one only to whom he actually uttered the forged instrument (a).

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WIGHTMAN, J., left it to the jury to say, whether the prisoner intended to defraud Leadbitter alone.

Verdict—Guilty, the jury finding that the prisoner did intend to defraud Leadbitter alone.

WIGHTMAN, J.—I shall reserve the point for the consideration of the fifteen Judges.

Pashley, for the prosecution.

Wilkins, for the prisoner.

[Attornies—*Floyd* and *Sykes*.]

In the ensuing term the case was considered by the Judges, who held the conviction right.

(a) See the cases of *Regina v. Bowen*, ante, p. 149, and *Regina v. Geach*, 9 C. & P. 499, and the cases then cited, and the case of *Rex v. Mazagora*, R. & R., C. C. 291.

REGINA v. SARAH GOLDTHORPE.

MURDER.—The prisoner was charged with the murder of her new-born illegitimate child.

It appeared that the prisoner had been suspected of being with child, but had always denied it, and that after her delivery she persisted in denying that she had had a child, but upon Mr. Parker, a surgeon, who examined her, discovering all the symptoms of recent delivery, and asking

If a woman endeavour to conceal the birth of her child, by placing the dead body of the child between a bed and a mattress, this is a sufficient disposing of the dead body to constitute an

offence within the stat. 9 Geo. 4, c. 31, s. 14, and it is not essential to such an offence that the dead body should either be put in some place intended for its final deposit, or be buried or destroyed.

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her what had become of the child, she, after some hesitation, said that it was under the bed. It was proved that the child was not under the bed, and that upon the prisoner being again asked where the child was, she said it was between the bed and the mattress. It was further proved that the body of the child was found between the bed and the mattress with a wound on its throat, which would have been mortal if the child had been born alive, which on the evidence was not conclusively shewn.

The jury found the prisoner not guilty of the murder, but guilty of concealing the birth of the child.

Wilkins, for the prisoner.—I submit that the prisoner cannot in this case be convicted of the concealment of the birth of this child, as the stat. 9 Geo. 4, c. 31, s. 14, applies only to cases where the body is either secretly buried or disposed of in some place of *final* deposit, and does not apply to cases where there is a hiding of the body in a place from which a further removal of the body is contemplated. This was so held in the cases of *Regina v. Ash* (a), and *Regina v. Bell* (b).

(a) 2 M. & Rob. 294. In that case, which was tried at the Dorchester Summer Assizes, 1840, Mr. Justice *Maule* held, that on an indictment for concealing the birth of a child, a *final* disposing of the body must be shewn, and that the hiding of the body in a place from which a further removal of the body is contemplated will not support the indictment.

(b) 2 M. & Rob. 294, n. In that case, which was tried at the Northumberland Spring Assizes, 1841, the prisoner was indicted for endeavouring to conceal the birth of her child, and it appeared that she had placed it in a box in her bed-room, and Baron *Rolfe* was of opinion

“that the statute contemplated some mode of disposing of the body, ejusdem generis, with the term ‘burying,’ as by burning, or cutting to pieces, &c., or by hiding it in some place intended for its final deposit.” In the case of *Rex v. Snell*, 2 M. & Rob. 44, on an indictment for a similar offence, the evidence was that the prisoner was crossing a yard, in a direction towards a privy with a bundle, and was stopped. This bundle contained the child. Baron *Gurney* held, that the prisoner could not be convicted, as she “was interrupted in the act probably of disposing of the body, but the act was incomplete.”

WIGHTMAN, J.—I will reserve the point for the consideration of the fifteen Judges.

Judgment respited.

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J. T. Ingham and Lister, for the prosecution.

Wilkins, for the prisoner.

[Attornies—*Ledgard*, and *Battye & Clay*.]

In the ensuing term the case was considered by the fifteen Judges, who held the conviction right.

REGINA v. JAMES DEALTRY STEEL.

CONSPIRACY.—The second count of the indictment was as follows: "And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James Dealtry Steel heretofore, to wit, on the same day and year aforesaid, with force and arms, at the parish of Huddersfield aforesaid, in the county aforesaid, unlawfully, wickedly, and deceitfully did conspire, combine, confederate, and agree, together with divers other persons to the jurors aforesaid unknown, to cheat and defraud the said *Jonas Donkersley and others* of certain other goods, wares, and merchandise, and that in further pursuance of the said wicked, fraudulent and unlawful conspiracy, combination, confederacy, and agreement, the said James Dealtry Steel heretofore, to wit, on the same day and year last aforesaid, at the parish of Huddersfield aforesaid, in the county aforesaid, did then and there falsely, unlawfully, and knowingly pretend

An indictment for a conspiracy charged the defendant with conspiring, with other persons unknown, "to cheat and defraud *J. D. and others*," and laid as overt acts that the defendant did falsely pretend to *J. D.* that he was a merchant named *G.*, and did under colour of a pretended contract with *J. D.* for the purchase of certain goods of "the said *J. D. and others*," obtain a large quantity of the goods "of the said *J. D. and others*," with intent to defraud "the said *J. D. and others*:"—Held, that the words "and others" throughout this indictment must be taken to mean *others the partners of J. D.*, and not other persons wholly unconnected with *J. D.*; and that on the trial of this indictment evidence was not admissible to shew that the defendant attempted to defraud other persons wholly unconnected with *J. D.*

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to the said Jonas Donkersley, that he the said J. D. Steel then and there was a merchant of the name of 'Grantham,' of the firm of 'Grantham, Nicholson, & Co.,' carrying on the business of woollen and stuff merchants in Park Lane, in Leeds, in the said county of York, and in Market Street in Huddersfield aforesaid, in the county aforesaid, and that in further prosecution of the said unlawful conspiracy, combination, confederacy, and agreement, and under colour and pretence of the said J. D. Steel being such merchant of such firm as aforesaid, he the said J. D. Steel did then and there, and under colour of a certain other pretended contract with the said Jonas Donkersley, for the purchase of certain other woollen cloth, of the goods, wares, and merchandise, *of the said Jonas Donkersley and others*, obtain and get possession of a large quantity of other woollen cloth, to wit, twenty yards of other woollen cloth, of great value, to wit, of the value of £12, of the goods, wares, and merchandise *of him the said Jonas Donkersley and others* from the said Jonas Donkersley, and whereas in truth and in fact the said J. D. Steel was not then and there a merchant of the name of 'Grantham,' of the said firm of 'Grantham, Nicholson, & Co.,' carrying on the business of woollen and stuff merchants, in Park Lane, in Leeds aforesaid, nor in Market Street in Huddersfield aforesaid, but falsely and deceitfully pretended the same, with intent then and there and by colour thereof to cheat and defraud *the said Jonas Donkersley and others*, to wit, at Huddersfield aforesaid, in the county aforesaid, to the great damage and deception of the said *Jonas Donkersley and others*, to the evil example of all others, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her Crown and dignity."

It appeared that Mr. Donkersley had partners, and evidence was given with a view of shewing an attempted fraud on that firm, and it was also proposed by Sir G.

Lewin, on the part of the prosecution, to go into evidence with a view of shewing attempts made by the defendant to defraud other persons as well as the firm of Donkersley & Co., of their goods.

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Bliss, for the defendant, submitted, that as the conspiracy was laid to be to defraud "Jonas Donkersley, and others," the words "and others," must be taken to mean others the partners of Jonas Donkersley, and that, therefore, evidence of attempts to defraud other persons unconnected with him was not receivable.

Sir *G. Lewin*, for the prosecution.—The words "and others," do not necessarily mean the partners of the person first mentioned, and a conspiracy to defraud one person "and others," would not be at all restricted to the defrauding of one firm only.

Bliss.—In the latter part of the second count the goods are stated to be the goods of "Jonas Donkersley and others," and there the words "and others," can only import others his partners; and if the construction contended for on the other side be correct, the words "and others" must have one meaning at one part of the count, and a different meaning at another part of the same count.

WIGHTMAN, J.—I shall receive the evidence, and I will reserve the point for the consideration of the fifteen Judges.

The evidence was received.

Verdict, guilty on the second count of the indictment.

Sir *G. Lewin*, and *Wasney*, for the prosecution.

Bliss, for the defendant.

[Attornies—*Clough*, and *Anderson*.]

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J., COLTMAN, J., ERSKINE, J., MAULE, J., ROLFE, B., AND
WIGHTMAN, J.

Bliss, for the defendant, submitted, that in the second count of this indictment the conspiracy charged, which was to defraud "Jonas Donkersley and others," must be restricted to mean a charge of conspiring to defraud Jonas Donkersley, and others his partners, and that if it did not so mean, the count would be bad for uncertainty, as it was uncertain whether the words "and others," included other persons as well as the partners of Mr. Donkersley, or whether those words included his partners only.

WIGHTMAN, J.—The objection taken at the trial was, that *ex vi termini*, the word "others," in this count, meant the partners of Jonas Donkersley, and must necessarily so mean: but the learned counsel for the prosecution put it, that the words "and others," in the charging of the conspiracy, included a number of persons totally unconnected with Mr. Donkersley.

Bliss.—I submit that the words "and others," must have the same meaning all through the count, and in the latter part of it, if the meaning is not restricted to partners, the indictment is clearly bad.

LORD ABINGER, C. B.—I think Mr. *Bliss* is right in saying, that the word "others" must have the same meaning in the earlier part of the count as in the latter part of it; and, with respect to the property of the goods, it must mean that they were the goods of Jonas Donkersley and his partners.

The case was afterwards considered by the Judges, who held the conviction wrong.

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LIVERPOOL ASSIZES.

BEFORE LORD DENMAN, C. J.

REGINA v. ROCHE and BLACKNEY.

MURDER.—The prisoners were indicted for the murder of Matthew Naylor, at Manchester.

A witness named Ann Butler, who had been examined before the coroner, was absent when called on the trial, without her absence being accounted for by either side.

It appeared that when the prisoner Roche was before the coroner, he made a statement in which he admitted the truth of certain statements contained in the deposition of Ann Butler.

It was proposed by *Wilkins*, for the prosecution, to put in the written examination of the prisoner Roche taken before the coroner, and also the deposition made before the coroner by Ann Butler.

The deposition of Ann Butler was as follows:—

"I, Ann Butler, of No. 28, Angel Street, near St. George's Road, state, that I have known prisoner for four years past, during which we have lived together as man and wife; having been separated several times through disagreement, he abusing me so much and nearly killing me, and I had not lived with him nor seen him for the previous three weeks up to Wednesday the 14th instant, having been confined at home through prisoner's abuse in the mean time, when I met him in Shude Hill about nine o'clock in the evening, and we slept together near Blakeley Street all night. About ten o'clock the next morning, and before we got up, prisoner addressing me, said, that I had like to

A. B., a witness on a coroner's inquest made a deposition, in which she stated a conversation with the prisoner on their seeing a placard relating to the murder of the deceased, and also stated that she called the prisoner a murderer; and also that she slept with the prisoner, and that he beat her and gave her two black eyes. The prisoner made a statement before the coroner, which was taken down in the following form:—"Prisoner admits sleeping with witness, blacking her eyes, seeing the placard, and his beating her, and her calling him murderer." *Semble*, that the statement of the prisoner, and also the deposition of A. B. were receivable in evi-

dence against the prisoner on his trial for the murder, and that it was no objection in point of law to the receiving of the statement in evidence, that it began, "Prisoner admits," although that is a very improper way of taking down a prisoner's statement.

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have lost him, if he had been caught; that he and some other fellows had a man up in Deansgate, near Jackson's Row, I think he said in Jackson's Row, but after all the—— had nothing about him but his coat and boots, and somebody crying out watch they had a hard run for it, and he had like to have been caught, and that one was taken but escaped. He said it was on the Monday night, and that he had been out all night, and was afraid of going home, and that he had not gone home until four o'clock on Tuesday afternoon, he was so tired and sleepy; that he had been out drinking the previous afternoon. He did not say with whom he had been, nor at what time of the night the deed was committed. At half-past twelve o'clock we went to Bagnall's vaults, and stopped there until half-past two in the afternoon, when we separated; agreeing to meet there again at four. On getting up I observed blood on his trousers. I asked him if he had been fighting; he said no, and I thought no more of it, but in the course of the morning I released a pair of trousers out of pawn, which he put on instead of the others, his reason being that the latter were so ragged, as was the case. I met him again about half-past nine the same night, I having been laid down in the mean time, and not wishing to meet him. This was in St. George's Road. We went towards the fair, and on the way we came up to a crowd of people reading a placard, a copy of which is now produced. I stopped, and on reading about the coat and boots, which corresponded with what prisoner had told me that morning, I charged him with it, but he denied it. I then tried to get rid of him on this account, but still he continued to dodge me, I still charging him with being concerned about the coat and boots, and he still persisting in his denial of it, until we got into Deansgate, when I stopped, refusing to go with him any further, and called him a murderer, upon which he beat me very severely, giving me two black eyes, and knocking me down, stamped upon me, and I became insensible.

"Ann ✕ Butler's mark.

"Sworn before me, JAS. CHAPMAN."

The statement of the prisoner Roche was as follows:—
 “Prisoner admits sleeping with witness; blacking her eyes; seeing the placard, and her charging him with the Jackson’s Row affair; and his beating her in Deansgate for it; and her calling him murderer.”

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J. P. Cobbett, for the prisoner Roche, objected, that the deposition of the absent witness, Ann Butler, was inadmissible, unless her absence were accounted for, as Ann Butler’s deposition could be no legal evidence per se, and could be admitted only by the prisoner’s statement having *expressly* referred to it, and so embodying her statement in his (a). That was not the case here, and therefore it was unfair to make his having referred to some circumstances which she also had mentioned, an excuse for putting in the whole of her deposition as evidence against him. This, too, was very much against general policy, and tending to great injustice, inasmuch as, if such a practice were allowed, the prosecutor might frequently keep all the witnesses out of the way, and upon the strength of a few words taken down from the prisoner himself, prove the whole case with the depositions. Another objection was, that Roche’s examination was taken in the third person, beginning—“Prisoner admits,” &c. This was not complying with the statute; and this did not purport to be the language of the prisoner at all, but merely the coroner’s expression of what he considered the prisoner to mean. The jury were to judge of the effect of the statement, and they could not do that without having before them the very words in which it had been made (b).

(a) See the case of *Rex v. John*, 7 C. & P. 324.

(b) “It will be observed” (says Mr. Sergeant *Russell*, in comparing the provisions of the two statutes, 1 & 2 P. & M. c. 13, s. 5, and 7 Geo. 4, c. 64, s. 4), that the principal

alterations enacted by the latter statute are, that the coroner is to put in writing the *evidence*, instead of the *effect of the evidence*, as directed by the former:” &c., 2 *Russell*. C. & M. 662, n. b.

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Lord DENMAN thought the grounds of objection were of considerable importance. As to the mode of taking the examination of the prisoner, that was a very improper way in which to do it. As to the argument, that if this evidence were admitted it would afford a facility of conducting the prosecution without the witnesses being heard, that, certainly, would be a most serious consequence, but that, his Lordship trusted, never would arise. His Lordship did not see how he could exclude this evidence, but should reserve the points in case it were necessary.

The deposition of Butler, together with Roche's examination, was then read.

The prisoners were both acquitted on the merits (c).

Wilkins, for the prosecution.

Bliss, for the prisoner Blackney.

J. P. Cobbett, for the prisoner Roche.

[Attornies—*Herford* and *Cobbett*.]

(c) Lord *Denman* directed that the prisoners should be detained, in order that they might be indicted for a larceny, in taking clothes of the deceased at the time of the

alleged murder. They were accordingly indicted at the next Spring Assizes; but the bill was ignored.

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WELSH SUMMER CIRCUIT, 1841.

CHESTER SUMMER ASSIZES.

BEFORE MR. JUSTICE ERSKINE.

REGINA v. ROBERT SANDYS AND ANN SANDYS.

MURDER.—The indictment was in the following form:
 “Cheshire, to wit. } The jurors for our Lady the Queen
 upon their oath present, that Robert Sandys, late of the parish of Stockport in the county of Chester, labourer, and Ann Sandys, otherwise called Ann Devannah, late of the same place, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, wickedly contriving and intending one Elizabeth Sandys with poison, wilfully, feloniously, and of their malice aforethought, to kill and murder, on the 23rd day of September, in the fourth year of the reign of our Sovereign Lady Victoria, with force and arms, at the parish aforesaid in the county aforesaid, feloniously, wilfully, and of their malice aforethought, a large quantity of a certain deadly poison called white arsenic, did give and administer unto the said Elizabeth Sandys, with intent that she should take and swallow down the same into her body (they then and there well knowing the said white arsenic to be a deadly poison), and the said white arsenic so given and administered unto her by the said Robert Sandys and Ann Sandys, otherwise called Ann

An indictment for murder by poisoning, which charges that the prisoner did administer the poison to the deceased, who took and swallowed it, by means of which taking and swallowing the deceased became mortally sick, and “of the said mortal sickness died,” is good without also stating that the deceased died of the poisoning.

A prisoner was tried for the murder of her child, E. S., by poison. E. S. died on the 25th of September. On the 14th of October following another child of the prisoner, named M. A. S.,

died under suspicious circumstances, and the prisoner was examined on oath at the coroner’s inquest held on M. A. S., and signed her deposition, in which she made a statement as to the death of E. S. Whether this deposition was receivable in evidence on the trial of the prisoner for the murder of E. S. *Quære.*

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Devannah as aforesaid, the said Elizabeth Sandys did then and there take and swallow down into her body, by reason and by means of which said taking and swallowing down the said white arsenic into her body as aforesaid, the said Elizabeth Sandys became and was mortally sick and distempered in her body, of which said mortal sickness and distemper the said Elizabeth Sandys, from the said 23rd day of September in the year last aforesaid, until the 25th day of the same month in the same year, at the parish aforesaid in the county aforesaid, did languish, and languishing did live, on which said 25th day of September in the year aforesaid, at the parish aforesaid, in the county aforesaid, the said Elizabeth Sandys *of the said mortal sickness died*; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Sandys and Ann Sandys, otherwise called Ann Devannah, the said Elizabeth Sandys, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace of our Lady the Queen, her Crown and dignity."

It appeared that the deceased Elizabeth Sandys was a child of the prisoners Sandys, aged six weeks, who died on the 25th of September, 1840, and was buried, and that no suspicion arose that her death had been occasioned by poison, until the death of Mary Ann Sandys, another child of the prisoners, aged four years, who died on the 13th October, 1840, under very suspicious circumstances. The body of Mary Ann Sandys was opened and examined, and arsenic, was found in her stomach and intestines, and the parents having insinuated that the child had been poisoned by a woman of the name of Riley, she was taken into custody upon the charge, and on the examination before the coroner as to the cause of Mary Ann Sandys' death on the 14th of October, the mother, Ann Sandys, was examined upon oath as a witness, and her deposition was taken in writing and read over to her, and she put her mark to it. In the course of that examination questions were put to

her relative to the death of Elizabeth Sandys, and in consequence of her answers and other circumstances, the body of Elizabeth Sandys was, on the 17th of October, disinterred and examined, when all the appearances indicated that that child also had died of poison, and arsenic was upon examination found in her stomach and intestines.

The parents, Robert and Ann Sandys, were thereupon taken into custody upon the charge of poisoning both the children, and on the 28th October were brought before the coroner in custody separately. When Ann Sandys was brought in, she was told that she was charged with having poisoned her two children, and that that was the time when she might make any statement that she liked to the jury, and that what she said would be taken down in writing. Her former deposition made by her as a witness on the 14th was then read over to her, and she said she had a further statement to make, which she made, and what she then said was written down and afterwards read over to her—she was asked to sign it, but she refused. The coroner signed it, and it was produced at the trial, and identified by the person who wrote it, and was offered in evidence against Ann Sandys, together with her original deposition.

Welsby, for the prisoners, objected, that, as the greater part of the statement had been made by the prisoner when under examination before the coroner upon oath, it could not be read in evidence against her. He cited the cases of *Regina v. Owen*(a), *Reg. v. Wheeley*(b).

Townsend, for the prosecution, referred to the cases of *Reg. v. Owen*(c); *Ros. Crim. Ev.* 45; 2 *Stark. Ev.* 28 (2nd edit); *Rex v. Mercer*(d); *Rex v. Gilham*(e); *Rex v. Swatkins*(f); *Rex v. Tubby*(g); *Rex v. Lewis*(h); *Reg. v. Da-*

(a) 9 C. & P. 238.

(b) 8 C. & P. 250.

(c) 9 C. & P. 83.

(d) 2 *Stark. N. P. C.* 366.

(e) 1 M. C. C. 203.

(f) 4 C. & P. 548.

(g) 5 *Id.* 530.(h) 6 *Id.* 161.

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vis(i); *Reg. v. Britton* (k); *Reg. v. Wheeler* (l); *Reg. v. Smith* (m); *Rex v. Rivers* (n); *Rex v. Webb* (o); and *Rex v. Howarth* (p).

ERSKINE, J.—I will receive the evidence, and reserve the point for the consideration of the fifteen Judges.

The evidence was received.

The jury found the prisoner Robert Sandys, guilty, and the prisoner Ann Sandys, not guilty.

Welsby, in arrest of judgment.—I submit that this indictment is bad, because it ought to have alleged that Elizabeth Sandys died of the poison and of the sickness occasioned thereby, and I submit that it is not sufficient to allege, that by reason of the swallowing of the poison the child became mortally sick and distempered, and that she afterwards died of the mortal sickness and distemper. Mr. Starkie, in his work on the Criminal Law, lays down (q), that “where several blows have been given or different kinds of poison have been administered,” it may be alleged generally that the party died “of the said several blows so struck or of the poisons so administered. It must be averred that the wound or bruise was mortal, and finally the adequacy of the means to produce death must be further shewn by a direct averment, that the party died of the stroke or poisoning, and this cannot be implied by any implication or intendment whatsoever.” So, in a case of death from a wound, Lord Hale says (r), that it is ne-

(i) *Id.* 177.

(k) 1 M. & Rob. 297; cited 9 C. & P. 240, n.

(l) 2 Lewin C. C. 157; cited 9 C. & P. 240, n.

(m) 1 Stark. N. P. 242.

(n) 7 C. & P. 177.

(o) 4 C. & P. 564.

(p) Greenwood's Coll. of stat. 138, n.

(q) 1 Stark, Cr. Pl. 93.

(r) 2 H. P. C. 186.

cessary to allege "that the party wounded died *of that wound*," not that he died of the illness occasioned by the wound. And Mr. Serjt. *Hawkins* (s) says, "that where the death was caused by divers poisons or wounds, &c., the count may say in general that the party died *of the several poisons* or wounds above mentioned, without saying that he died of any one of them in particular."

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ERSKINE, J.—I will reserve the point for the consideration of the fifteen Judges.

Townsend, for the prosecution.

Welsby, for the prisoners.

[Attornies—*Coppock & Wortham*, and *Faughan*.]

BEFORE LORD DENMAN, C. J.; TINDAL, C. J.; LORD ABINGER, C. B.; PARKE, B.; GUBNEY, B.; WILLIAMS, J.; COLTMAN, J.; ERSKINE, J.; MAULE, J.; ROLFE, B.; AND WIGHTMAN, J.

Welsby, for the prisoners, renewed his objection in arrest of judgment, and in addition to the authorities relied on by him at the trial he cited the following passage from Sir E. H. East's *Pleas of the Crown* (t): "But in all cases the death by the means stated must be positively alleged, and cannot be taken by implication; and therefore where the mean of death is alleged to be by any stroke, the indictment should proceed to aver, that the prisoner thereby gave to the deceased a mortal wound or bruise whereof he died, or *where by poison*, after stating particularly the manner of the poison's being administered, that the party died *of the poison so taken* and the sickness thereby occasioned."

(s) 2 Curw. Hawk. ch. 23, s. 83.

(t) 1 Ea. P. C. 343.

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LORD DENMAN, C. J.—There is no authority referred to by Sir E. H. East that supports that proposition.

Welsby.—In Miss Blandy's case the indictment charged that the deceased died of the poison and of the sickness.

PARKE, B.—The indictment against Captain Donellan, for the murder of Sir Theodosius Boughton, charged that the deceased died of the sickness occasioned by the poison (*u*).

LORD DENMAN, C. J.—Mr. *Townsend*, we think we need not hear you. The authorities do not appear to support the objection, and the indictment in Captain Donellan's case appears to be similar to the present.

The case was considered by the Judges, who were unanimously of opinion that the indictment was good, and that the conviction of the prisoner Robert Sandys was correct; but as the prisoner Ann Sandys could not be again put upon her trial, their Lordships thought it unnecessary to consider whether her examination (which was only received as evidence against herself, and so expressly left to the jury) had been properly received or not.

(*u*) The form of the indictment that against Miss Blandy, *Id.*, p. 387, and 18 St. Tr. 1117.
against Captain Donellan will be found in 2 Stark. Cr. Pl., p. 392, and

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COURT OF COMMON PLEAS.

Middlesex Sittings after Easter Term, 1841.

BEFORE MR. JUSTICE COLTMAN.

HUBERT *v.* TURNER and Others.

Jan. 14th.

DECLARATION on a special agreement, dated 25th March, 1839, between the plaintiff and the defendants, that the plaintiff undertook to convey by water, coal belonging to the defendants, from their vessels lying in the Thames to their works at Millbank, for three years from the date of the agreement, and that the defendants undertook to employ him in such work.

Breach: that the defendants did employ the plaintiff for a certain time, but not during the three years specified in the agreement. Other counts more general.

Pleas: non assumpsit, and denial of the various allegations in the declaration.

The plaintiff was a Thames lighterman, and the defendants directors of a Gas Company, having their works at Millbank. In March, 1839, an advertisement was agreed upon by the board of the company for tenders for lightering their coals for three years, and it was afterwards inserted in the newspapers. The plaintiff sent in his tender which was accepted; the entries in the minute books of the board being to the effect following:—

“26th March, 1832.

“Letter received and read, recommending T. Hubert as a fit and proper person; after which it was moved and carried that his tender be accepted, and he be appointed lighterman to the company.”

An agreement in writing made by proper authority, contained in the body of it the names of all the contracting parties, and concluded: “In witness whereof we have hereto set our hands, &c.,” but there was not any signature at the foot of the agreement by any one.—*Held*, that the agreement was not signed by the parties to be charged under the provisions of the Statute of Frauds, because the names were inserted of necessity in the body of the agreement, to make sense of it, and should not be used over again as signatures; and because it appeared from the whole of the document that the parties had not intended it to be binding upon

them until the names had been signed at the foot of the paper.

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"2nd April, 1839.

"The agreement between the company and Thomas Hubert for three years read and approved, and a fair copy thereof directed to be sent to T. Hubert."

The plaintiff conveyed the coals for the company from March, 1839, to September, 1840 (18 months), when they dismissed him, having made another contract. Respecting the agreement, the secretary of the company said on the trial, "I remember making out an agreement and submitting it to the board. The first copy of it I wrote out myself for the plaintiff's approval. Plaintiff sent it me back with some little alteration. The alteration was only of a clerical error. I shewed it to the board so altered. The altered agreement was approved of *verbally* by them; there was no resolution passed on the occasion. There were two copies then made; the plaintiff afterwards called and I gave him one of them. That is it now produced. The alteration made by the plaintiff did not affect the substance of the contents of the agreement. The three persons named in the agreement were all shareholders in the concern at the time."

It was then proposed to read the agreement (a).

Bompas, Serjt.—It is not an agreement signed by the parties to be charged, it is only a copy.

COLTMAN, J.—It is the one that was approved of by the directors.

(a) The beginning and conclusion of the agreement was in the following terms:—"Articles of agreement made, concluded, and fully agreed upon, this day of &c., between Thomas Hubert of &c., of the one part, and A. B., C. D., and E. F., Trustees and Directors of the Gas Light and Coal Company, of the other part.

"Whereas the said T. Hubert has

agreed with the said A. B., C. D., and E. F., acting herein on behalf of the Gas Light and Coal Company, to convey by water, &c. * * * And, for the due performance of this agreement, each of the said parties hereto bindeth himself and themselves unto the other and others of them by these presents. As witness our hands."

Bompas, Serjt.—Still it is not signed by either party according to the requisitions of the Statute of Frauds.

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Shee, Serjt., contrà.—This is a sufficient signature to satisfy the statute. The agreement is drawn up under the direction of a joint-stock company by their secretary; and there are three names in the body of it, all names of shareholders. I submit that is abundantly sufficient.

COLTMAN, J.—I do not think the agreement can be read, but I will reserve the point.

Verdict for the plaintiff—Damages £150.

Shee, Serjt., and *Wordsworth*, for the plaintiff.

Bompas, Serjt., and *Addison*, for the defendants.

[Attornies—*C. Draper*, and *Williamson & Hill*.]

Afterwards the Court in banc was moved for a nonsuit, pursuant to the leave reserved, on various points; but the Court gave judgment only on that touching the validity of the agreement, as respecting the Statute of Frauds, several cases being cited on both sides (*b*).

TINDAL, C. J., said—This is not an agreement so signed as to be binding within the Statute of Frauds. The names of the parties it is true are introduced into the body of the document, and, we will assume, so introduced with their authority; but those names must have been introduced of necessity, to make sense of the document. And it is impossible to say from the frame of this instrument, that the parties did not intend to have put their signatures to it, before it was supposed to be complete. Great care should be taken in cases of this sort, or every case will be one degree weaker, and more remote from the intention of the statute, than that which preceded it.

The rule for a nonsuit must be made absolute.

(*b*) *Johnson and Others v. Dodgson*, 2 M. & W. 653; *Sanderson v. Jackson*, 2 B. & P. 238: *Schneider v. Norris*, 2 M. & S. 286; 2 Bing. N. C. 735; *Graham v. Musson*, 5 Bing. N. C. 607.

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Sittings at Guildhall after Trinity Term, 1841.

BEFORE LORD CHIEF JUSTICE TINDAL.

July 9th.

M'LAUGHLIN v. PRYOR.

A trespass was committed by the defendant's carriage driving against the plaintiff's gig; but the defendant was riding in a hired carriage at the time with hired horses and hired postillions, yet as he made no remonstrance against the course which the drivers were taking till his admonition came too late: —*Held*, that he was liable in an action of trespass, as a co-trespasser with the postillions.

In an action of trespass it is competent for the jury to consider the words which the defendant used subsequently to the trespass, in coming to the conclusion whether he were a joint trespasser with those actually committing the mischief.

TRESPASS. That the defendant drove his carriage against the plaintiff's gig, and upset the gig and injured the plaintiff. Pleas, not guilty; and that the accident happened through the plaintiff's own fault. *De injuriâ*.

The defendant and seven others were driving in a carriage and four, with two postillions, to Epsom races on the 3rd of June, 1840. The defendant with another of the party sat upon the box. The carriage was not in the line of the vehicles which were going through the turnpike at Sutton, and as it approached the toll-bar the postillions endeavoured to get into that line in order that they might pass through the gate. The plaintiff, and a friend of his, Mr. Mason, were driving in a small gig at that *particular* place, where the postillions attempted to fall into the train. The man on the wheel horses said to the other postillion, "break in; you are all right there;" and upon doing this the trace of the leaders of the carriage caught the wheel of the plaintiff's gig, the gig was upset, and the plaintiff was injured and rendered lame for life.

Immediately before the accident the defendant called out to his postillions to let the plaintiff's gig pass first, but the order then came too late. As soon as the accident had occurred the defendant offered every assistance, and he said he would make himself liable for the damage that had happened.

It was in evidence that Mason subsequently called upon him and asked him to pay for the repair of the gig, but said, that if the defendant would tell him who was the owner of the carriage and horses, he would not look to

him at all for the damage done to the gig. The defendant said that he would not give up any names, for he had made himself responsible for what had happened. But he put the blame upon Mason himself, and added, "If you had gone out quietly when the lad drove the leaders against you, it would not have happened, I intended to have pulled up and let you go in front afterwards." It was proved on behalf of the defendant, that the carriage and horses were hired, and that the postillions were the servants of the man who let the horses to hire; and it was said that the two lines of carriages converged into one line at the gate, that there was an opening in the line there, and that the defendant had got in at that opening; that a policeman directed the defendant's postillions to go into the line, that the gig had given way, receded, and got to the right hand side of the road, and then attempted to get into the line again; and thereupon, the second plea that the accident happened through the plaintiff's fault.

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Kelly, for the defendants, submitted, on the authority of the cases which he cited, that the action could not be sustained against the defendant, as the carriage and horses were hired, and the whole system was under the guidance and government of the two postillions (a). He also insisted upon the point of fact, that the plaintiff drove his

(a) *Laugher v. Pointer*, 5 B. & C. 547; *Smith v. Lawrence*, 2 M. & R. 1.; *Quarman v. Bennett*, 6 M. & W. 499. In *Laugher v. Pointer*, 5 B. & C. 547, two of the judges were of opinion, that the person who hired job horses and also hired a coachman was liable for the misconduct of the coachman who was driving those horses, and the other two judges held the contrary. Afterwards in *Quarman v. Bennett*, 6 M. & W. 499, the case was,

that the owner of a carriage hired the horses to draw it, and the owner of the hired horses provided a driver, one of the men in his employ, and who was selected from the others at the request of the hirer herself; through his default, but while he was obeying a specific direction of the hirer, the horses ran away, and an injury happened: and it was held that the owner of the carriage was not liable.

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gig against the carriage, forcing the gig into the line where he should not.

TINDAL, C. J., (in summing up).—On the frame of these issues, before a verdict can be found for the plaintiff, you must be satisfied that the trespass arose from the carriage of the defendant running against that of the plaintiff. It is not enough that you should think the defendant's drivers were wrong in getting into the line where there was an opening, perhaps, not sufficient for them, or that the persons in the gig were right in attempting to regain their position in the line, but you must find in fact the carriage drove against the gig. The defendant was not driving the carriage himself; he was driven by two postillions, who had been hired from a job-master: whether that will or will not make any difference, supposing that you are satisfied on the facts of the case that the defendant is liable, is a question for another inquiry. His Lordship then went over the conflicting evidence on both sides.

Verdict for the plaintiff; damages £600.

Talfourd, Serjt., and *Hoggins*, for the plaintiff.

Kelly, *Channel*, Serjt., and *Marsh*, for the defendant.

[Attornies—*Wise & Child*, and *Rooper & Birch*.]

April 26th.
 1842.

Afterwards (a), on cause shewn against the defendant's rule nisi for a nonsuit on the point reserved, it was said by—

TINDAL, C. J.—The question is, could the defendant be a trespasser here? In the cases cited the action was in 'Case,' and the master for the time being was held exempt from liability, because, not knowing the driver, whom perhaps he would not have trusted if he had known him, he was considered not liable for the driver's act. Here the defendant is a joint trespasser with the postillions.

(a) 6 Jurist, 372.

All persons acting together in trespass are co-trespassers. The jury having found that the carriage drove against the gig, the postillions are trespassers; there certainly were circumstances in the conduct of the defendant whether active or passive, from which the jury might infer that he was acting in concert with the postillions, and they have so found. If the defendant had remonstrated with the drivers or expostulated—if there had been any expression, however slight, to that effect, I should say that the rule for a nonsuit ought to be made absolute, for no servant can make his master a trespasser against his will; but as this gentleman, the defendant, was on the box, and did not interpose to prevent the accident, though there is not the slightest evidence of any thing like command, there is enough evidence for the jury, of assent. But there is more than passive acquiescence; for the defendant says he had intended to have stopped, unless the plaintiff had run against him, and had intended to let the plaintiff go on first—meaning thereby that he had control over the acts of the postillions. I think therefore that this is a case in which the dominus pro tempore, and not the original master, has assented to an injury done by the act of the servant, as in the case of *Chandler v. Broughton* (b).—And of this opinion was the rest of the Court.

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M'LAUGHLIN
v.
PRYOR.

Rule for a nonsuit refused.

(b) 1 Cr. & M. 29. Where a master and servant are together in a vehicle, and an accident occurs, from which an immediate injury ensues, the master is liable in trespass and not in case, although the servant was driving and not only no evidence is given on the part of

the plaintiff of any interference on the master's part, but the evidence on the part of the defendant distinctly negatives any interference: so that the mere presence of the master with the servant will constitute him a trespasser, if the act of the servant amount to a trespass.

PROMOTION.

IN the Vacation after Hilary Term, 1842, *F. S. Murphy*, Esq., was called to the degree of Serjeant-at-law.

1841.

IN THE EXCHEQUER.

Sittings at Guildhall after Michaelmas Term, 1841.

BEFORE THE LORD CHIEF BARON.

Dec. 14th.

GABRIEL and Another v. EVILL.

The defendant contemplated entering into partnership with the house of B. & S. V. In furtherance of his intention he advanced £2000 to them. They removed their banking account at his recommendation, and changed the name of their firm to "B. & S. V. & Co.;" but no formal deed of partnership had been signed, nor was any entry shewn in the books of B. & S. V. which proved the defendant to be a partner:—
Held, that it was a question proper to be left to the jury, whether the defendant were liable as a partner for the debt of B. & S. V. & Co.

THIS was an action brought by the plaintiff to recover the balance of the value of goods sold by him to the defendant, trading under the firm of B. & S. Vanderplank & Co. The firm had become bankrupt since the sale, and its estate had paid £78 out of an account of £390, leaving £312 for which the defendant was now sued. The plaintiffs' case was, that Evill was a secret partner. In 1838 the bankrupts began to trade as woollen drapers, under the name of B. & S. Vanderplank. In 1839 the defendant contemplated becoming a partner in the firm, and mentioned this to the house of Fletcher & Son, upon whom he used to draw and they on him; and he said that he wished to raise £2000, which he was to supply to the firm; and in raising this amount the house of Fletcher assisted him.

A memorandum of the intended partnership was read. The partnership was to commence in April, and B. & S. Vanderplank, who had before then banked with the Marylebone Bank, now removed their account to Glyn's, under the recommendation of the defendant, and changed the name of their firm to B. & S. Vanderplank & Co.

Erle and Petersdorff, for the plaintiffs, relied on the conversation with Fletcher & Son respecting the partnership advance made to the house of B. & S. Vanderplank of £2000; the altered style of the firm, and the change of the banking

account, to shew that the defendant underlay the consequences and liabilities of a partnership, which was complete at the time the advance was made.

The case for the defendant was, that he was not bound for the debts of B. & S. Vanderplank & Co., until he had put his name to the agreement for the partnership.

Henry Fletcher, a partner in the firm of Fletcher & Co., said that their house had had many bill transactions with the defendant. In February, 1839, Evill told him he contemplated partnership with some house—he did not say which. In May, 1839, Evill stated to the witness the terms of the proposed partnership with B. & S. Vanderplank, and said that he (Evill) was to advance £1000 in cloth and £1000 in cash, for which latter amount he was to be at liberty to draw on the firm, and proposed that the witness should draw the bills in his stead, because he wished to reserve to himself to draw upon the firm for goods to be supplied to them. He stated that the firm was to be called B. & S. Vanderplank & Co., that he was to be represented by the “Co. ;” that his name was not to appear, because then, he would not be able to draw for the goods. Bills were accordingly drawn by the witness on Vanderplank’s house, from the month of June, 1839, to April, 1840, and discounted by him for the defendant.

Samuel Vanderplank, a member of the late firm, said, that the defendant had treated with them as to proposals for becoming partner; but that it was only a *proposition* for a partnership, and was never finally agreed to. That the name of the firm was altered by the addition of “Co.” in May, 1839; but at that time, also, there was only a partnership in prospect. That the partnership of B. & S. Vanderplank was dissolved in August, 1840, but the defendant was never consulted about the dissolution, nor was any account of profits ever rendered to him, nor did he ever claim any profits.

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EVILL.

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Lord ABINGER, C. B. (in summing up).—The question is, whether there was any actual partnership or not?—Drawing bills in contemplation of a partnership will not of itself make a man a partner.

I remember a case in which one Steele applied to Morris to take Steele's son into partnership, and the terms were, that, if the son approved of the concern at the end of a year, the father was to be a partner, and the firm to be called by the name of Morris & Steele. Upon this £6000 was advanced at once. During the year Morris adopted the style of Morris & Steele, but Steele the father did not know of it, though his son did. And Lord *Roslyn* held in equity, and *Thompson, B.*, and a special jury, at law, that Steele was not liable, on the ground that a mere advance of money on a prospective partnership, in contemplation of partnership not finally agreed on, did not make a partner of the person who advanced the money.

His Lordship commented, too, on the fact, that no one entry had been shewed in the books of B. & S. Vanderplank & Co. which proved Evill to be a partner in the firm, and concluded.—If you are satisfied that he was a partner you will find for the plaintiffs. If, on the other hand, there was only a contemplation of partnership, the verdict must be for the defendant.

Verdict for the defendant.

Erle and Petersdorff, for plaintiffs.

Sir *F. Pollock, A.-G.*, *Knowles* and *Willes*, for defendant.

[Attornies—*Van Sandau & Cumming*, and *Asprey*.]

Afterwards in Hilary Term, 1842, the Court refused to give a rule for a new trial.

1840.

IN THE COMMON PLEAS.

BEFORE LORD CHIEF JUSTICE TINDAL.

MANLEY v. SHAW.

Dec. 23rd.

ASSUMPSIT on a bill of exchange by the plaintiff as indorsee against the defendant as acceptor. Plea, that the defendant did not accept, and two special pleas.

The cause was undefended.

After the handwriting of the defendant as acceptor had been proved, one of the jury, on looking at the bill, said that the stamp was a forgery, and stated to his Lordship, that several respectable houses had been found in possession of forged stamps to a great extent, one of them to the extent of £500 worth.

J. Jervis, for the plaintiff, submitted, that the verdict must be for the plaintiff, as there was not any evidence to shew that the stamp was forged.

TINDAL, C. J.—The gentleman of the jury who says that the stamp is a forgery, should be sworn as a witness to give evidence to his brother jurors, before they can act upon his opinion^(a).

His Lordship then told the jurymen, that, if he thought proper, he might be sworn and examined as a witness to prove the forgery.

On the trial of an action of assumpsit on a bill of exchange, where the cause was undefended, one of the jury said that the stamp was forged, and called the attention of the Judge to the fact:—*Held*, that the jurymen must be sworn as a witness to give evidence to his brother jurors, before they can act upon his opinion; and on his declining to be sworn as a witness, the Judge told the jury that they must find for the plaintiff.

^(a) In the case of *Reg. v. Frederick Rosser*, ante, Vol. 7, p. 648, it was decided that, where in a criminal prosecution it is essential to prove the particular value of an article, the jury may use that general knowledge which any man can

bring to the subject; but if any of the jurors has a particular knowledge of the subject, arising from his being in the trade, he ought to be sworn and examined as a witness.

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v.

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The juryman stated, that he should decline being examined as a witness.

TINDAL, C. J., to the jury.—Then, gentlemen, you have only to find your verdict for the plaintiff.

Verdict for the plaintiff.

J. Jervis and *E. James*, for the plaintiff.

[Attornies—*Roberts* and *Thwaites*.]

COURT OF QUEEN'S BENCH.

Sittings at Westminster after Hilary Term, 1842.

BEFORE MR. JUSTICE WIGHTMAN.

(*Who sat for the Lord Chief Justice.*)

1842.

Feb. 3rd.

VEITCH v. RUSSELL.

A contract to pay a physician cannot be implied from the mere fact of his attendance on a patient, but a promise at the end of his attendance, to pay him a fixed sum, or a reasonable compensation, will raise such a contract as will support an action.

ASSUMPSIT for work and labour, journeys and attendances. Plea, non assumpsit.

The action was brought to recover £157 for the attendance of the plaintiff as a physician upon the brother of the defendant. The defendant was a lady living at Bayswater. The plaintiff lived at Richmond. The defendant's brother, Thomas Beckley, had been attended by the plaintiff in his professional capacity, from September, 1839, to April, 1840. In July, 1840, the defendant wrote to the plaintiff, stating that her brother had been suddenly taken ill again, and requesting the plaintiff to go and see him at Camberwell. The plaintiff accordingly attended his patient from July to September, 1840, the nature of the disease being one that required his daily supervision. In August the patient was removed to town, and the defendant wrote the following letter to the plaintiff:—

"Dear Sir,—As your account against me for attendances on my brother must be rather a formidable one, you will oblige me by letting me have it up to the time of his removal to town.—Believe me, &c."

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On the 9th of September the defendant wrote another letter to the plaintiff, from which this is an extract:—

"My wish is to present you with such a sum as you would call upon me to pay you. Now, as this can only be done by your telling me what that sum should be, I shall feel greatly obliged to you by your doing so. I really do not see how I can spare you this trouble, for I do not know what expenses you have incurred, or what you would deem, under the circumstances, a suitable acknowledgment of your great professional skill and attention."

The plaintiff then named the sum of 150 guineas, and a correspondence ensued, in which the defendant objected to the amount named, and offered to pay £60 or £70; and on the 15th of December she wrote, desiring to know the name of the plaintiff's bankers, that she might pay £70 to his account "in liquidation of her debt."

The plaintiff had paid £42 for fly-hire, and four shillings a day to the driver for the six weeks between the 21st of July and the 17th of September, 1840.

Sir *F. Pollock*, A. G., in opening the case, contended, that the presumption that a physician attended gratuitously was rebutted here by an express promise to pay, as in *Style v. Smith*, cited by *Popham, J.*, in *Marsh v. Rainsford*(a).

Thesiger.—The plaintiff must be called. It is admitted that he is a physician, and attended as such; and a physician is not entitled to bring an action for his fees. *Chorley v.*

(a) 2 Leon. 111. In *Style v. Smith*, cited by *Popham, J.*, it was determined that if a physician, in the absence of a father, give his son medicine, and the father, in consideration thereof, promise to pay him, an action will lie for the money.

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Bolcot (b). Nor can he maintain an action for work and labour as a surgeon, if he have passed himself off as a physician, whether he have a diploma or not. *Lipscombe v. Holmes* (c). The letter of September 15th must be taken as an admission of a debt to the amount of £70, either for services rendered or upon an account stated. But the account stated must have a pre-existing debt to support it. The case from *Leonard* does not apply, for no contract can now be enforced upon the ground of a moral obligation to pay. *Wennall v. Adney* (d); *Eastwood v. Kenyon* (e).

WIGHTMAN, J.—It appears to me that the present case is not like those cited for the defendant. Whatever the general rule may be, I think that here there is evidence to go to the jury of an express contract.

Thesiger then addressed the jury for the defendant.

WIGHTMAN, J. (in summing up).—This is an action by a physician to recover reasonable compensation for his professional services. Such an action is unusual, because there is in general a conventional mode of payment, which may be accounted for by the obvious impossibility of setting a specific value on services chiefly intellectual. But though the action is unusual, it is still a novel doctrine to me, to hear that a physician cannot contract for compensation. All that the cases decide is, that a contract cannot be implied from the mere fact of a physician's attendance on a patient; but he may contract for a fixed sum, or for a reasonable compensation at the end of his attendance. It is for you to say, whether there was here a contract that Dr. Veitch should be remunerated for his services; and you will collect such a contract, if you should be of opinion that there was one, not merely from the

(b) 4 T. R. 317. See also *Battersby v. Lawrence*, 1 Car. & Mar. p. 277.

(c) 2 Camp. 441.

(d) 3 B. & P. 252, n.

(e) 11 A. & E. 438.

request to attend, but from the other circumstances of the case. The question is, whether there was such an agreement, or whether the whole matter was left on the ordinary footing between physician and patient. On the 30th of August the defendant writes a letter, from which it appears that she considered there was an account between them, and that Dr. Veitch did not stand in the ordinary position occupied by a physician in relation to his patient. Does this letter lead your minds to the conclusion that there was a previous agreement? The letter of 9th September is important, for it puts the case somewhat on a different footing from that which generally exists in these cases, as the patient usually does not ask what expenses his physician has incurred. Again, until the very last, the defendant does not so much object to pay, as to pay 150 guineas. If you can infer from the case a definite contract to pay money out of pocket, then there is a precise sum which has been shewn to have been spent by the plaintiff.

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Verdict for the defendant.

Pollock, A. G., Peacock, and Lutwyche, for the plaintiff.

Thesiger, Warren, and Bovill, for the defendant.

[Attornies—*T. & S. Naylor, and Tustin & Barlow.*]

In the ensuing term *Pollock, A. G.*, obtained a rule for a new trial, upon the ground that the verdict was against evidence, which rule was afterwards discharged on the ground that the jury had negatived the existence of any contract; but the Court was of opinion that a physician might enter into a contract for the payment of his fees, and enforce that contract; and said, that the Court had recently decided the point in the same way in the case of a barrister (*g*), and also in that of an arbitrator (*h*).

(*g*) *Egan v. Guard. of the Kensington Union.*

(*h*) *Hoggins v. Gordon*, 11 Law J., New S., Q. B. 286.

1842.

Second Sitting at Westminster in Easter Term, 1842.

BEFORE MR. JUSTICE COLERIDGE.

April 21st.

WALKER v. MASSEY and Another.

IN Q. B. a cause duly entered for trial at the first sitting in term, and not tried at that sitting, cannot be tried at the second sitting in term, unless the record and writ of distringas are resealed *before the day* appointed for the second sitting; and if there be no resealing before the day appointed for the second sitting, the cause will, under the rule of 25th November, 1825, be omitted from the written list of the second sitting, and the judge at Nisi Prius will not allow a resealing afterwards, in order to have the cause tried at the second sitting, even where the cause has not been reached in its order.

THIS cause had been entered for trial at the first sitting in this term. The first sitting was on the 16th of April, and was continued by adjournment to the 18th and 19th. The second sitting was on the 20th of April, and was continued by adjournment to the 21st. This cause was in the written list of causes for trial on the 19th, but was not reached at the rising of the Court at three o'clock on that day. On the 20th, the plaintiff's attorney applied at the Marshal's office for the writ of distringas and record, in order to have them resealed, when he was informed by the proper officer that the cause had been struck out of the list, and could not be tried at the second sitting, because the writ of distringas and record had not been resealed *previous* to the second sitting.

Platt, for the plaintiff, applied that the cause might be restored to its place in the list, and that it should be tried in its regular order at the then sittings, the causes which had stood before it not having all been disposed of. He moved on the affidavit of Mr. Dickson, which stated the foregoing facts; and he argued, that as the Marshal's office closed at two, and was again open only from six to eight, and the seal office closed at five, the plaintiff's attorney could not have got his record from the Marshal's office early enough on the 19th to have had it resealed *before* the 20th, which was the day of the second sitting.

The Hon. *T. Denman* stated, that whenever records

were not resealed before the sitting day, the cases were always struck out of the list, and that that had been the uniform practice under the rule of the 29th of November, 1825 (a).

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Wordsworth, for the defendants.—It was quite possible for the plaintiff's attorney to have taken away his jury process and record and have got them resealed; and even if he could not, the rule is imperative; and if the record and jury process are not resealed before the second sitting has begun, the party will only be entitled to try at the next sitting, which is the third; and with respect to any supposed inconvenience, that can be only considered on an application to rescind the rule.

Platt.—I admit that the resealing is necessary to make the cause triable; but if the cause is not yet called on, and the record is in a perfect state before it is called on, I hope that your Lordship will allow it to be tried.

COLERIDGE, J.—It is conceded that this record was not resealed till after the commencement of the present sitting. The rule of 1825 says, that it must be resealed before the sitting at which the cause is tried. I do not enter at all into the merits of the rule, or whether the sittings conti-

(a) The following is a copy of the rule of 29th November, 1825:—
“Whereas, by a rule made in Easter Term, 33 Geo. 3, (1793), it was ordered by the Court, ‘that the writs of distringas and the records in causes which stand over from one sittings to another, be regularly resealed previous to the sittings to which they stand over, or, in default thereof, the causes be not tried.’ Now for enforcing obedience

to the said rule, it is hereby ordered by the Lord Chief Justice, that the Marshal do not, after the present sittings, insert in the daily list of causes for trial any causes wherein the writ of distringas and record shall not have been regularly resealed previous to the sitting to which the same cause may stand over, according to the said recited rule.”

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ning *de die in diem* be a convenience or not; but I am clearly of opinion, that under that rule this cause cannot be tried.

Application refused.

Platt, for the plaintiff.

Wordsworth, for the defendants.

[Attornies—*Battye & Co.*, and *Macduff & Fitzgerald*.]

Sitting in London in Trinity Term, 1842.

BEFORE MR. JUSTICE WIGHTMAN.

June 11th.

WARD and Another v. MORRISON and Others.

If a party makes a promissory note, whereby he promises to pay the plaintiff, or order, "£600, with interest thereon, at the rate of six per cent. per annum, twelve months after date," the judge will advise the jury, in allowing interest up to the time of signing judgment, to allow it at the rate of five per cent. only.

DEBT. The first count of the declaration stated, that the defendants, on the 28th of January, 1841, made their promissory note, and thereby promised to pay to the plaintiffs, or their order, "£600, with interest thereon, at the rate of six per cent. per annum, twelve months after the date thereof," and that although the defendants had paid the interest when the note became due, yet they had not paid the said £600. There was also a second and third counts for interest and upon an account stated. Pleas to the first count, that the defendants did not make the note, and, to the second and third counts, that the defendants were never indebted.

It was opened by *Udall* for the plaintiffs, that the defendants had paid the interest at six per cent. up to the time when the note became due, and that the only question was, whether the jury would give six per cent. on the principal sum of £600 from the time the note became

payable till the time of signing judgment, or whether they would give five per cent. only (a).

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WIGHTMAN, J.—I should think the jury will not give more than five per cent.

The making of the note was proved, and the note was in the terms stated in the declaration.

WIGHTMAN, J. (in summing up).—If parties have made a contract for six per cent. on a bill of exchange, they must abide by that contract; but where you have to allow interest as damages for the non-payment of money at a time agreed on, you will probably think five per cent. sufficient.

Verdict for the plaintiff, for 611*l.* 3*s.*, being the amount of the note, with interest at five per cent.

Udall, for the plaintiffs.

Phinn, for the defendants.

[Attornies—*Wilkinson & Hill*, and *Frowd*.]

(a) By the stat. 3 & 4 Will. 4, c. 42, s. 28, it is enacted, "That upon *all debts or sums certain* payable at a certain time, or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums cer-

tain be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases where it is now payable by law."

1842.

Adjourned Sittings in London after Trinity Term, 1842.

BEFORE LORD DENMAN, C. J.

June 30th.

LITTLE v. OLDAKER.

A physician cannot sue for his fees for any thing he has done as a physician, either in attending or in prescribing medicine for a patient; but if he acts as a surgeon, or in any other capacity than that of physician, he may maintain an action for a compensation for what he has done, provided he can shew that it was not done by him as a physician; and the fact that the plaintiff was not paid fees at the times when he was consulted, goes to shew that he was not acting as a physician.

ASSUMPSIT for work and labour, with a count upon an account stated. Plea, *non assumpsit*.

It was opened by *Butt*, for the plaintiff, that the plaintiff was a surgeon and a member of the Royal College of Surgeons, and also physician to an institution for curing contractions of the feet; and that in the months of August and September, 1839, he had cured the defendant of the venereal disease, the plaintiff having attended the defendant not as a physician, but as a surgeon. He submitted that although a physician could not maintain an action for his fees, there was no law to hinder a physician, who was also a surgeon, from practising as a surgeon, and recovering the value of his services, in the same way as a physician could if he were employed to write a book. He cited the case of *Battersby v. Lawrence* (a).

Mr. Belfour, the secretary to the Royal College of Surgeons, proved the seal of that college to the plaintiff's diploma as a member of it, dated the 17th of August, 1832 (b).

(a) *Ante*, p. 277.

(b) One object of this evidence no doubt was to shew that the plaintiff was a surgeon as well as a physician. It is, however, well worthy of consideration, whether a person who is not authorized to practise as an apothecary, and who practises as a surgeon, can recover either for attendance as a surgeon, or for medicines given by him in a surgical case, if he be not a mem-

ber of the College of Surgeons and has not passed the examination prescribed by the stat. 3 Hen. 8, c. 11. It appears, however, from the cases of *Barnett v. Glossop* and *Gremare v. Le Clerc Bois Valon*, hereafter cited, that, in order to raise that question, a defence on this ground must be specially pleaded, and that the defendant must shew by evidence that the plaintiff is not a member of the College of

It was proved by a female servant of the plaintiff, that the defendant came to her master's house as a patient se-

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Surgeons, and also (as it seems) that he has not passed the examination prescribed by the stat. 3 Hen. 8, c. 11. From the case of *Barnett v. Glossop*, 1 Scott, 621, it appears that, where the plaintiff would have had a good cause of action at common law, but that the promise is void because the requisites of a statute have not been complied with, the defendant must plead it specially, and cannot take advantage of this defence on the general issue. And it was for some time considered doubtful whether, in an action on an apothecary's bill, the defendant was not bound to plead that the plaintiff was not entitled to practise as an apothecary, if he meant to put the plaintiff to prove it; but it now appears to be settled by the case of *Wagstaffe v. Sharpe*, 3 Mee. & W. 521, that the plaintiff must prove, even on the general issue, that he is entitled to practise as an apothecary, in consequence of the express terms of the 21st sect. of the Apothecaries' Act, 55 Geo. 3, c. 194.

By the stat. 3 Hen. 8, c. 11, after reciting (*inter alia*) "That common artificers, as smiths, weavers, and women, boldly and accustomedly take upon them great cures and things of great difficulty, in the which they partly use sorcery and witchcraft," it is enacted, "That no person *within the city of London, nor within seven miles of the same*, take upon him to exercise and occupy as a physician or surgeon, except he be first examined, approved, and admitted by the bishop of London or by the

dean of St. Paul's for the time being, calling to him or them four doctors of physic, and for surgery other expert persons in that faculty, and for the first examination such as they shall think convenient, and afterwards always four of them that have been so approved, upon the pain of forfeiture, for every month that they do occupy as physicians or surgeons not admitted nor examined after the tenour of this act, of £5, to be employed, the one-half thereof to the use of our sovereign Lord the King, and the other half thereof to any person that will sue for it by action of debt, in which no wager of law nor protection shall be allowed." And by sect. 2 of that statute, "And over this, that no person out of the said city and precinct of seven miles of the same, except he have been (as is said before) approved in the same, take upon him to exercise and occupy as a physician or surgeon in any diocese within this realm; but if he be first examined and approved by the bishop of the same diocese, or he being out of the diocese, by his vicar-general, either of them calling to them such expert persons in the said faculties as their discretion shall think convenient, and giving their letters testimonials under their seal to him that they shall so approve, upon like pain to them that occupy contrary to this act (as is above said), to be levied and employed after the form before expressed." By sect. 3 of the same statute, there is a saving of the privileges of Oxford and Cambridge. As this statute

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veral times a week during the months of August and September, 1839; but this witness, in her cross-examination,

does not give costs, a plaintiff who recovered penalties under it would not be entitled to any costs at all. *Shore v. Madiston*, 1 Salk. 208; Com. Dig. tit. Costs, A. 2; Hulloock on Costs, 17, 212.

By the stat. 34 & 35 Hen. 8, c. 8, after reciting, That by the stat. 3 Hen. 8, c. 11, 'for the avoiding of sorceries, witchcrafts, and other inconveniences, it was enacted, that no person *within the city of London, nor within seven miles of the same*, should take upon him to exercise and occupy as physician or surgeon, except he be first examined, approved, and admitted by the bishop of London and other, under and upon certain pains and penalties in the same act mentioned: Sithence the making of which said act, the company and fellowship of surgeons of London, minding only their own lucre and nothing the profit or ease of the diseased or patient, have sued, troubled, and vexed *divers honest persons, as well men as women*, whom God hath endued with the knowledge of the nature, kind, and operation of certain herbs, roots, and waters, and the using and ministering of them to such as been pained with customable diseases, as women's breasts being sore, a pin and the web in the eye, uncomes of hands, burnings, scaldings, sore mouths, the stone, strangury, saucelim and morphew, and such other like diseases; *and yet the said persons have not taken any thing for their pains or cunning, but have ministered the same to poor people only for neighbourhood and God's sake,*

and of pity and charity. And it is now well known, that the surgeons admitted will do no cure to any person but where they shall know to be rewarded with a greater sum or reward than the cure extendeth unto, for in case they would minister their cunning unto sore people unrewarded, there should not so many rot and periah to death for lack or help of surgery, as daily do; but the greatest part of surgeons admitted been much more to be blamed than those persons that they trouble, for although the most part of the persons of the said craft of surgeons have small cunning, yet they will take great sums of money and do little, therefore, and by reason thereof, they do oftentimes impair and hurt their patients, rather than do them good.' "In consideration whereof, *and for the ease, comfort, succour, help, relief and health of the King's poor subjects*, inhabitants of this realm, now pained or diseased, or that hereafter shall be pained or diseased, be it ordained, established, and enacted, by authority of this present Parliament, that at all times from henceforth, it shall be lawful to every person being the King's subject, having knowledge and experience of the nature of herbs, roots and waters, or of the operation of the same by speculation or practice, within any part of the realm of England, or within any other the King's dominions, to practise, use, and minister *in and to any outward sore, uncome wound, apostemations, outward swelling or disease, any herb or herbe, oint-*

said, "My master is a physician, and is called Dr. Little, and 'Dr. Little' is on the door."

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ments, baths, pultess, and emplaisters, according to their cunning, experience, and knowledge in any of the diseases, sores, and maladies before said, and all other like to the same, or *drinks for the stone, strangury, or agues*, without suit, vexation, trouble, penalty, or loss of their goods, the foresaid statute in the foresaid 3rd year of the King's most gracious reign, or any other act, ordinance, or statute to the contrary heretofore made, in anywise notwithstanding." With respect to this statute, Lord Chief Baron Comyns says (Com. Dig. tit. Physician, D.), that it "enables only to make application to external sores, &c., not to internal." In *Le Colledge de Physitiens' case*, Littleton's Reports, 349, Lord Chief Justice *Richardson*, in delivering the judgment of the Court of Common Pleas, says, "On consideration of the 34 Hen. 8, we are of opinion, that this statute reaches neither in words, nor in intent and meaning, to give liberty to any person that practises or exercises for lucre or profit; and it is apparent from the preamble, and the statute also, that it was made principally against churgeons, who were covetous; for the statute has limited who shall practise and for what diseases, and the parties licensed by it were those who were good honest people, as old women, and such who will give neighbourly physic for charity and piety, and not such as seek gain by it, as empiricks, who do not any thing for piety and charity; so that this statute excludes all those who take any money or gain." This case

afterwards came before the Court of King's Bench, on a writ of error, [nom. *Butler v. Pres. of the Coll. of Physitiens*, Cro. Car. 256.], but the propositions of law laid down by L. C. J. *Richardson*, as above stated, do not appear to have been at all questioned; however, on that occasion, L. C. J. *Richardson* (who had then become Lord Chief Justice of England) conceived that the statute 34 & 35 Hen. 8, c. 8, was virtually repealed by the stat. 1 Mar., sess. 2, c. 9 [which confirms the stat. 14 & 15 Hen. 8, c. 5, which ratified the charter of the College of Physicians]; but Mr. Justice *Croke* was of opinion, that as the stat. 34 & 35 Hen. 8, c. 8, does not mention the stat. 14 & 15 Hen. 8, c. 5, which "was for Physicians"; and as the stat. 34 & 35 Hen. 8, c. 8, was concerning churgeons, "that statute was never intended to be taken away by the act of primo Marix." But upon this point, Mr. Justice *Jones* and Mr. Justice *Whitlocke*, would not deliver their opinions, but all the Judges resolved, that, admitting the stat. 34 & 35 Hen. 8, c. 8, to be in force, the defendant had pleaded a bad plea, and the judgment therefore was against him.

By the stat. 18 Geo. 2, c. 15, which was an act for making the surgeons of London and the barbers of London two separate and distinct corporations, it is enacted, [by sect. 8] that, "all such who already have been, or hereafter shall be, examined and approved pursuant to the rules of the said company, [of surgeons made, esta-

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It was also proved by Mr. Lane, who served the writ of summons on the defendant, that the latter said it was for

blished, and incorporated by this act], shall be entitled to practise freely and without restraint the art and science of surgery throughout all and every his Majesty's dominions, any law or custom to the contrary notwithstanding." In the preamble of that statute, letters patent of 5 Car. 1 are recited, which contain a clause, prohibiting persons from practising surgery for lucre or profit, in London, or within seven miles, unless they had been examined by two or more of the Masters or Governors of the Mystery and Commonalty of Barbers and Surgeons, or by four of the examiners of the surgeons of London; but the stat. 18 Geo. 2, c. 15, does not appear either to confirm this prohibitory provision of the letters patent, or to contain any enactment of a similar kind.

In the case of *Gremare v. Le Clerc Bois Valon*, 2 Camp. 144, which was an action by a French emigrant priest, resident in London, against another French emigrant priest for attendance as a surgeon. The defendant relied on the stat. 3 Hen. 8, c. 11, s. 1; but Mr. Garrow, for the plaintiff, "insisted that there being no absolute prohibition of persons unlicensed acting as surgeons, they might maintain an action against persons whom they had attended and cured. By paying the penalty of £5 a month, they satisfied the statute." "Lord Ellenborough was of opinion that the action was maintainable, and the plaintiff recovered a verdict for 20*l*." "In the ensuing term, *Clifford* obtained

a rule to shew cause why the verdict should not be set aside, on the ground that the plaintiff's conduct in practising as a surgeon was illegal, and that he could not be entitled to recover a compensation for his labour, on the very same evidence which would convict him of the penalty of £5 a month. But when cause was shewn, the court said that it had not been proved that the plaintiff was not regularly licensed as a member of the College of Surgeons, which he might be, although he was a French emigrant priest;" and the rule to set aside the verdict was discharged. It is difficult to understand what is meant in Mr. Garrow's argument, by the statement that the statute 3 Hen. 8, c. 11, contains "no absolute prohibition of persons unlicensed acting as surgeons," as the terms of this statute appear to be quite as prohibitory, and in terms nearly similar to those of the stat. 29 Car. 2, c. 7, (for the better observance of the Lord's Day), under which contracts made by persons in their trades on a Sunday are held void.

In the case of *Cope v. Rowlands*, 2 M. & W. 149, the doctrine as to contracts forbidden, either by common or statute law, was much considered, and the case of *Gremare v. Le Clerc Bois Valon* cited; and in the case of *Cope v. Rowlands*, it was held, that a broker cannot maintain an action for work, labour, and commission for buying and selling stock, &c., unless duly licensed by the Mayor and Aldermen of the city of London, pursu-

curing him of a certain disease, and he thought the charges were high, but that he had tendered five pounds or five guineas.

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ant to the stat. 6 Anne, c. 16; and Baron *Parke*, in delivering judgment in that case, said, "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by common or statute law, no court will lend its assistance to give it effect. It is equally clear, that a contract is void if prohibited by statute, though the statute inflicts a penalty only, because such penalty implies a prohibition; and it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract. And in the same judgment, Baron *Parke* also says, "one other case, cited for the plaintiff, remains to be noticed; it is that of *Gremare v. Le Clerc Bois Valon*, in which Lord *Ellenborough* held that the plaintiff could recover for surgery and medicines, though he had not been admitted pursuant to the statute 3 Hen. 8, c. 11, s. 1. It is certainly difficult to reconcile this case with the rule above laid down, for the provisions of that statute were clearly meant to secure to the public skilful practitioners in surgery and medicine: but on a motion for a new trial, the Court of King's Bench do not appear to have sanctioned the doctrine of

Lord *Ellenborough*, for they disposed of the case on another ground, namely, that there was no proof that the plaintiff had *not* been duly licensed; we therefore think that case not a binding authority."

With respect to a surgeon (who is not entitled to practise as an apothecary) recovering for medicines supplied by him, it was held in the case of *Alison v. Haydon*, 1 M. & P. 588, that the plaintiff, who was a member of the Royal College of Surgeons, but not an apothecary, could not recover for medicines supplied by him in a case of typhus fever, but Lord Chief Justice *Best* said, "Whatever medicine may be necessary for the purpose of removing a complaint, which it is the duty of a surgeon to attend to and cure, he might perhaps be allowed to recover for, but he is not entitled to recover unless the medicine he administers be clearly ancillary to his duty as a surgeon:" and Mr. Justice *Park* says, "Here the plaintiff, being only qualified to act as a surgeon, has acted in the character of an apothecary, and he cannot be entitled to recover for attendance as such, or for medicines administered to a patient, unless in a case falling expressly within his own department as a surgeon."

In the later case of *Simpson v. Ralfe*, 4 Tyr. 325, Mr. Baron *Bayley* said, "There was evidence for the jury that the complaints were of a nature requiring surgical aid. Then if the plaintiff attended as a surgeon, the Apo-

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It was proved by Mr. Alfred Hamilton, a surgeon, that this was a surgical case.

Petersdorff, for the defendant.—I submit that the plaintiff is not entitled to recover anything in this action. The plaintiff acts as a physician, and has “Dr. Little” on his door; and I submit, that he cannot separate his character of physician from that of a surgeon, and that on his becoming a physician he drops and abandons his character of surgeon. The rule of law is, that a physician can maintain no action for any services rendered by him in that character. Dr. Little being a physician, and avowedly so, must in this instance be presumed to have acted in that capacity; and there have been cases in which it has been held, that even a false assumption by the party that he was a physician prevented him from suing for a compensation for his services (c). How can it be presumed that the defendant did not consult the plaintiff as a physician? No one was present but themselves; and it might be that the

thecaries’ Act does not take away his power to recover for his attendance as such, because he also dispensed medicines. There is no evidence that the medicines were dispensed by the plaintiff as an apothecary, nor does he claim as one. I do not see why he might not dispense medicine as incident to his business, in the course of attending a patient as a surgeon.”

(c) In the case of *Chorley*, M.D., v. *Bolcot*, 4 T. R. 317, it was held that a physician cannot maintain an action for his fees; and in the case of *Lipcombe v. Holmes*, 2 Camp. 440, which was an action brought by the plaintiff for work and labour as a surgeon, it appeared that the plaintiff wrote prescriptions, was called “Doctor,” and signed himself M.D. The

plaintiff’s counsel, Mr. (afterwards Mr. Justice) *Park* stated, that he should shew that, at the time when the visits were paid, the plaintiff was only a surgeon; but Lord *Ellenborough*, C. J., said, “If a person passes himself off as a physician, he must take the character cum onere. When he brings an action for visits paid by him as a physician, I will give him credit for being so, and tell him he must trust to the honour of his patients. Whether the plaintiff had or had not a diploma when he attended the defendant, is immaterial; whatever he was, if he at that time wrote prescriptions and added M.D. to his name, he must be nonsuited.” See the case of *Veitch v. Russell*, ante, p. 362.

defendant not only consulted the plaintiff as a physician, but also paid him his fee at each time when he consulted him.

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Lord DENMAN, C. J. (in summing up).—A physician cannot sue for his fees for anything he has done as a physician, either in attending or in prescribing medicine for a patient; but if he acts as a surgeon or in any other capacity than that of a physician, he does not forfeit his right to sue for a compensation for what he has done, provided he can shew that it was not done by him as a physician. This case seems to be one in which the plaintiff might have acted either as a surgeon or a physician; and it has been suggested that you ought to presume that he was paid his fees at the times when he was consulted, but that is evidently not so upon the evidence of Mr. Lane; and the fact that the plaintiff was not paid at the different times when he was consulted, goes to shew that the defendant was not acting as a physician, and also that the defendant himself did not consider that the plaintiff was acting as a physician.

Verdict for the plaintiff.

Butt and Ball, for the plaintiff.

Petersdorff, for the defendant.

[Attornies—*Jennings*, and *Dawes*.]

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June 30th.

ROBSON and Another v. CURLEWIS.

A notice of dishonour, addressed to the defendant, stating, that "your draft upon Mr. G. C. for £50, due 3rd March, is returned to us unpaid, and, if not taken up in the course of this day, proceedings will be taken against both you and him for the recovery thereof," is a good notice of dishonour.

DEBT by the plaintiffs as indorsees of a bill of exchange, dated 29th of November, 1841, drawn by the defendant on George Carrington for £50, payable three months after date to the order of the defendant, and by him indorsed to the plaintiffs.

Plea—"that the defendant had not notice of the non-payment of the said bill of exchange."

The notice of dishonour was in the following form:—

"Sir,

London, 4th March, 1842.

"Your draft upon Mr. George Carrington for £50, due 3rd March, is returned to us unpaid; and, if not taken up in the course of this day, proceedings will be taken against both you and him for the recovery thereof.

"We are, sir, your obedient servants,

"Mr. H. C. Curlewis.

"ROBSON & M'GARSON."

Petersdorff, for the defendant.—I submit that this notice of dishonour is not sufficient. In the case of *Boulton v. Welsh* (a), a notice of dishonour, which stated that the note "became due yesterday, and was returned to me unpaid," was held to be insufficient. In the case of *Hedger v. Steavenson* (b), which is a later case than that of *Boulton v. Welsh*, the notice was that the note "became due yesterday, and has been returned unpaid; and I have to request you will please remit the amount thereof, with 1s. 6d. noting." And the Court of Exchequer held that that notice was sufficient; but there the charge for noting clearly shewed that the note must have been presented and dishonoured.

LORD DENMAN, C. J.—I have no doubt that this is a

(a) 3 Bing. N. C. 688.

(b) 2 M. & W. 799.

good notice of dishonour. Baron *Parke* disclaims the distinction as to the charge for the noting.

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Verdict for the plaintiffs.

Montagu Chambers, for the plaintiffs.

Petersdorff, for the defendant.

[Attornies—*Fisher*, and *Vallance*.]

In the ensuing term, *Petersdorff* applied for a new trial, but the Court refused a rule, and expressly overruled the case of *Boulton v. Welsh* (c).

(c) In the case of *Hedger v. Steavenson*, 2 M. & W. 799, Baron *Parke* said, "The word 'returned' is almost a technical term in matters of this nature, and means that a bill has come to maturity, has been presented, and has not been paid;" and in the same case his Lordship also said, "There is indeed one circumstance mentioned in this notice of dishonour, which does not appear in the notice in *Boulton v. Welsh*, viz. that the bill had been noted; that constitutes a distinction, but I disclaim to go on that distinction." In the case of *King v. Bickley*, 2 G. & D. 131, n. (a), in which the notice of dishonour, after describing the bill simply, added, "lies at &c., dishonoured," it was held by the Court of Queen's Bench that this was a sufficient notice of dishonour. But in the case of *Furze*

v. Sharwood, Id. 116, it was held, that notices which stated that "a bill due yesterday is unpaid;" "William Howard's acceptance for 21l. 4s. 4d., due on Saturday, is unpaid, he has promised to pay it in a week or ten days;" and "a bill (describing it) lies due and unpaid at my house," were all insufficient, because, consistently with all that is set forth, the plaintiff, either from ignorance or inadvertence, or because he might really have looked to another, might have abstained altogether from presenting any of these bills. The subject of notice of dishonour appears to have been much considered by the Court of Queen's Bench in the case of *Furze v. Sharwood*, and the previous authorities are reviewed in the very elaborate judgment in that case.

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Sittings at Westminster after Michaelmas Term, 1842.

BEFORE LORD DENMAN, C. J.

Dec. 5th.

HOWARD, Gent., &c., v. GOSSETT, Esq., and Others.

Officers of the House of Commons, who have a warrant of the Speaker to take a person therein named, although they may have a right to enter his house (having been peaceably admitted) and to search the house, they have no right, in case they do not find him, to remain there to await his return; and if they stay several hours in the house for that purpose, they are trespassers *ab initio*.

In opening a case, a plaintiff's counsel has a right to refer to and comment on an act of Parliament which has passed since the transaction which is the subject of the action, as it may go to show what the law was before the passing of the act, but he has no right

to state what occurred in the progress of the act through the Houses of Parliament, such as that counsel were heard against its passing, because he would not be entitled to go into evidence of such facts.

Although, where a fact is admitted as to one issue on the record, and denied as to another, the admission on the one issue is not evidence on the other; yet, if the jury find both issues for the plaintiff, they may, in estimating the damages on the whole case, take into their consideration what appear on the whole case to be the real facts of it.

TRESPASS.—The first count of the declaration stated, that on the 4th of February, 1840, the defendants broke and entered the plaintiff's house, situate No. 7, Norfolk-street, in the parish of Saint Clement Danes, in the county of Middlesex, and remained there making a great noise and disturbance for twenty-four hours, and broke open and injured divers doors and locks. Second count, that the defendants, on the same day, after having broken and entered the house on pretence of searching for the plaintiff, and after the expiration of a reasonable time for making such search, and after they had in fact made it, again broke and entered the plaintiff's house, and remained there two hours encumbering it.

Pleas—first, as to the breaking the doors and injuring the locks, not guilty; and second, as to the residue of the trespasses, that, on the 27th of January, 1840, a Parliament was held at Westminster, and that the plaintiff was ordered by the House of Commons to attend that House forthwith on a charge of contempt; that the plaintiff disregarded the order, and secreted himself to avoid the execution of any warrant, whereupon the House of Commons, on the 4th of February, 1840, resolved that the Speaker should issue his warrant to have the plaintiff brought up in custody of the serjeant-at-arms; that the warrant was

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issued and delivered to Sir William Gossett, then being serjeant-at-arms, and by him delivered to the defendants as his deputies to execute; and because the said house was the residence of the plaintiff, and a likely place wherein to find him, the defendants went there, and having knocked at the outer door were peaceably admitted, and made search for the plaintiff, and remained as in the first count mentioned, but did not find the plaintiff there; and because it was a likely place to find the plaintiff, they the defendants did, for the purpose of executing the said warrant and whilst it was in force, peaceably and quietly (the outer door being open) go in, break, and enter the said house and continue there as in the second count mentioned.

Replication—to the plea of not guilty, a similitur; and to the second plea, so far as the same relates to the trespasses in the first count of the declaration mentioned, that the Speaker of the House of Commons did not authorize the serjeant-at-arms by warrant in manner and form as pleaded; and so far as the said plea relates to the trespasses in the second count of the said declaration, that true it is that a Parliament was holden as in the plea mentioned, and true it is that the resolution was made by the House of Commons as in the plea mentioned, and true it is that the Speaker issued his warrant as in the plea is mentioned, nevertheless the defendants, of their own wrong and without the residue of the cause pleaded in justification, committed the trespasses in the second count mentioned.

It was opened by *Platt*, for the plaintiff, that in the year 1837 a report was made by the inspectors of prisons under the stat. 5 & 6 Will. 4, c. 38, in which it was stated that a book was found in one of the prisons which was published by a person named Stockdale, and the inspectors of prisons in that report gave a character to that book which if not true was libellous. If this report had been circulated only among the members of the House of Commons there would have been nothing to complain of, but instead

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of that the House of Commons authorized Messrs. Hansard to publish it and sell it to every one who chose to purchase it, and Mr. Stockdale, insisting that the book was a medical work and that the inspectors of prisons were mistaken in the character of it, brought his action against Messrs. Hansard for a libel, and Messrs. Hansard in that action pleaded two pleas, the one denying the publication, and the other asserting that the work was of the character imputed to it, and on the trial of that cause the then Attorney-General (*a*) contended that the authority of a resolution of the House of Commons justified the publication of a libel; but Lord *Denman*, C. J., who tried the case, distinctly laid down (*b*), that the fact of the House of Commons having directed Messrs. Hansard to publish all the parliamentary reports was no justification to them if such publication contained a libel. Soon after that the House of Commons appointed a committee to inquire into the subject of privilege; and on the 8th of May, 1837, that committee reported that the power of publishing such of its reports as it should deem conducive to the public interests was an essential incident to the constitutional functions of the House of Commons, and that the prosecution of any action for the purpose of bringing any of the privileges of the House of Commons into discussion elsewhere than in Parliament was a high breach of privilege. After that report of the committee, the sale of the report of the inspectors of prisons being still continued, Mr. Stockdale brought a second action against Messrs. Hansard; and on the 8th of June, 1837, it was moved and carried in the House of Commons that Messrs. Hansard should be permitted to plead to that action, which they did, justifying under the supposed jurisdiction of the House of Commons. That plea was demurred to, and on the 31st of May, 1839, the judges of the Court of Queen's Bench decided that it was no justification (*c*) to Messrs.

(*a*) Sir *John* (afterwards Lord) (*b*) 7 C. & P. 731.
Campbell. (*c*) 2 P. & D. 1.

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Hansard. That case then went to a jury, who gave Mr. Stockdale 100*l.* damages. However, Messrs. Hansard still continued to sell the report of the inspectors of prisons; and on the 26th of August, 1839, Mr. Stockdale brought a third action against them, in which they suffered judgment to go by default, and the jury in the writ of inquiry in that action gave Mr. Stockdale 600*l.* damages. The sheriffs tried to stay the proceedings (*d*), but could not succeed in doing so, and a writ having issued commanding them to levy on Messrs. Hansard, it was, on the 16th of January, 1840, moved and carried in the House of Commons that Mr. Stockdale, Mr. Howard (the present plaintiff, who was his attorney), the sheriffs, the under-sheriffs, and the sheriffs' officer, should appear before the House; and on the 22nd of January, after the sheriffs had been imprisoned on a vote of the House of Commons, a rule was made in the Court of Queen's Bench commanding the sheriffs to pay over the money levied in the third action to Mr. Stockdale. The publication of the report of the inspectors of prisons still continuing, Mr. Stockdale, on the 23rd of January, 1840, brought a fourth action, and still employed the present plaintiff as his attorney in it; and on the 4th of February, at about half-past seven in the evening, two of the defendants came to the plaintiff's house in Norfolk-street, and after they had been told that the plaintiff was not there, they searched the house from top to bottom, and having satisfied themselves that the plaintiff was not there, said that they would stay till the plaintiff came back. A letter from the plaintiff was shewn to the defendants, which stated that the plaintiff would attend the House of Commons on the following day, but the defendants persisted in staying in the house, and did so till half-past one on the following morning, when a person came and directed them to withdraw, which they did. On the following day, the plaintiff attended the House of

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Commons, and avowed that he had done his duty, and the result was that he was sent to Newgate, where he remained from the 6th of February to the 14th of May; and after the committal of the plaintiff, the House of Commons passed a bill with unseemly haste to protect themselves, and inserted a clause to prevent the plaintiff from asserting his rights. This was the stat. 3 Vict. c. 9.

Pollock, A. G.—I submit that *Mr. Platt* has no right to quote an act of Parliament which was passed after this action was brought.

Lord DENMAN, C. J.—I think he may refer to the act with a view of shewing what the law was before it passed, but not go into the history of the passing of the act.

Platt.—An attempt was made in this bill (as originally brought in) to stop the present action, and the plaintiff petitioned the House of Lords against it. I myself appeared at the Bar of the House of Lords as counsel.

Lord DENMAN, C. J.—*Mr. Platt*, you are now going too far; you could not go into evidence of what you are now stating.

It appeared from the evidence of *Mr. Howard*, jun., the son of the plaintiff, and *Mr. Pearce*, one of his clerks, that on the evening of the 4th of February, at about seven o'clock, *Mr. Stein* and *Mr. Bellamy*, two of the defendants, who were officers of the House of Commons, came to the house of the plaintiff and stated that they had the Speaker's warrant against the plaintiff, and that they must search the house, which they did; and that not finding the plaintiff, *Mr. Bellamy* said that they must stay in the house till the plaintiff returned, however long that might be; and that at about half-past one on the same night, *Captain Gossett*, the assistant serjeant-at-arms of the House of

Commons, came and desired Mr. Bellamy to read the Speaker's warrant, which he did; and that by about twenty minutes past one all the defendants had left the plaintiff's house. It was also proved, that soon after Mr. Bellamy and Mr. Stein came to the plaintiff's house, Mr. Howard, jun., shewed them a letter from the plaintiff, which stated that he would attend at the House of Commons on the following day. From the cross-examination it appeared that the conduct of the defendants was perfectly gentlemanlike, and that there was not the slightest incivility or rudeness on either side.

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Pollock, A. G., for the defendants.—The plaintiff upon this record does not deny to the House of Commons the right they contend for, and the letter of the plaintiff shews that he did not intend to set himself against the authority of the House of Commons, if properly exercised—on the contrary, it is quite clear that the plaintiff intended to attorn to their jurisdiction. I admit that the defendants, who are officers of the House of Commons, have been guilty of an irregularity in the execution of their warrant. They stayed in the house of the plaintiff after they knew that he was not there, intending to await his return; and that they had no right to do, as those who have the execution of a warrant, although they have a right to enter the person's house, and to search his house to find him, and to be in the house a reasonable time for the purpose of making that search, have no right to stay in the house till the party comes back. The plaintiff's declaration consists of two complaints: the one the entering the house and breaking the doors and locks; and the other the staying in the house. I am bound to admit that the defendants' staying in the house cannot be justified; and that that being so, the defendants were trespassers ab initio, and the case is therefore a question of damages only; and the case, so far from raising any question on the jurisdiction of the House of Commons, entirely admits it. If the

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plaintiff had intended to raise the constitutional question he should have demurred to the plea; instead of which, as to one part of the case, he denies the issuing of the Speaker's warrant as a matter of fact, which renders this a question of excess of jurisdiction, in which the jurisdiction itself is not affected to be denied. It was held, in the *Sir Carpenters' case* (e), that if a party having a writ or warrant to execute is guilty of an excess, that renders him a trespasser ab initio, and the writ or warrant does not protect the party even to the extent to which it would have protected him if he had not been guilty of excess; and this was so even in the case of any excess committed in distraining for rent, before the stat. 11 Geo. 2, c. 19; and the present defendants are in the same situation as a sheriff who, though both himself and his officer would be protected in executing the Queen's writ, is still liable to an action if he or his officer is guilty of an excess.

Lord DENMAN, C. J. (in summing up).—The defendants have pleaded a justification that they were acting under the warrant of the Speaker of the House of Commons; and the plaintiff, by his replication as to the trespasses in the first count of the declaration, denies the warrant; but as to the trespasses in the second count, the plaintiff admits the resolution of the House of Commons, and the warrant as stated in the plea, and denies only the residue of the justification; but with reference to the amount of damages, we must look at the whole case. It is properly admitted by the learned Attorney-General, that all that the defendants did, in remaining in the house for the purpose of taking the plaintiff when he should come back, cannot be justified; but the plaintiff also admits, that, as to the searching the house, the defendants may be justified.

Platt.—No warrant has been given in evidence; and, as to the trespasses in the first count, the warrant is denied.

(e) 8 Co. 146.

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LORD DENMAN, C. J.—No doubt all the issues must be found for the plaintiff, except as to breaking the doors and locks, which did not occur; but, as to the question of damages, we cannot shut our eyes to the fact, that, in replying as to trespasses in the second count, the plaintiff admits that a warrant was issued by the Speaker; and I think it is pretty clear upon the evidence, that the search was made under it; but it is also conceded, that the defendants by unlawfully staying in the house after the search was made became trespassers *ab initio*, and that prevents them from availing themselves of what would be otherwise a justification up to that point. The defendants seem to have acted without the least appearance of malice, and thinking they were justified in what they did; still the plaintiff's business must have been interrupted, and his family put to great inconvenience under a claim of a right which cannot be justified in point of law; and those persons, who have to execute extraordinary powers upon great and extraordinary occasions, ought, before they act, to inform themselves of the extent of their powers. You will therefore say what just and reasonable compensation these defendants, who are officers of the House of Commons, should make for this trespass, that their warrant from the House of Commons did not authorize.

Verdict for the defendants, as to the breaking of two doors and locks; and as to the residue, for the plaintiff—Damages £100.

Platt, Kelly, and Petersdorff, for the plaintiff.

Pollock, A. G., Follett, S. G., Crompton, and F. Pollock, for the defendants.

[Attornies—*T. B. Howard, and Parkes & B.*]

1842.

Dec. 6th.

REGINA v. CHRISTIAN.

An office copy of a bill in Chancery, which a witness examined with the original, but which office copy contained abbreviations, such as "pnl. este." for the words "personal estate," in the original bill, is not such an examined copy as will be evidence to support an allegation of a bill in Chancery on an indictment for perjury, committed in an affidavit in that suit in Chancery.

Semble, that a person may be convicted of perjury contained in an affidavit intitled, in a cause, "A. B. against C. D. and others," although, by the rules of the courts, all affidavits should in their title name all the plaintiffs and all the defendants.

An affidavit was sworn in a cause of the Commissioners of Charitable

Donations and Bequests in Ireland, against J. E. D.; and in an indictment for perjury on it, the affidavit was alleged to be intitled in that cause. The affidavit was intitled the "Commissioner," instead of "Commissioners;" but the Lord Chief Justice allowed an amendment of the indictment to obviate an objection as to this variance.

PERJURY.—The indictment stated, that before the committing of the offence by the defendant Edward Joseph Christian, "to wit, on the 3rd day of May, 1822, to wit, in the county of Middlesex, the *Commissioners* of Charitable Donations and Bequests in Ireland did exhibit their certain English bill of complaint in writing against James Edward Devereux, Daniel Reardon, Colin Alexander M'Kenzie, George Lewis Newnham Collingwood, and George Hammond, in the High Court of Chancery of our late sovereign lord King George the Fourth, which said bill was directed to the Right Hon. *John* Lord *Eldon*, then Lord High Chancellor of Great Britain; that on the 1st of May, 1827, Daniel Reardon died, and that on the 22nd of May, 1827, administration of his goods and chattels was granted to Elizabeth Reardon; and thereupon afterwards, to wit, on the 27th day of June, 1827, to wit, in the county aforesaid, the said commissioners did exhibit their certain other bill of complaint in writing against the said Elizabeth Reardon in the High Court of Chancery, and which said bill was directed to the Right Hon. *John Singleton* Baron *Lyndhurst*, of Lyndhurst, in the county of Southampton, then Lord High Chancellor of Great Britain, and which said last-mentioned bill was exhibited for the purpose of reviving the said suit so commenced by the said commissioners as aforesaid; and the same was thereupon afterwards, by an order of the said then Lord High Chancellor, bearing date on the 18th day of July, 1827, duly revived accordingly. And the jurors aforesaid, upon their oaths aforesaid, do further present, that before the committing of the offence by the said Edward Joseph Christian as

hereinafter mentioned, to wit, on the 2nd day of July, 1841, to wit, in the county aforesaid, the said E. J. Christian did exhibit his certain English bill of complaint in writing against the said James Edward Devereux, the said *Commissioners* of Charitable Donations and Bequests in Ireland, and the said Elizabeth Reardon, Philip Davies, Michael Macarthy, Edward Thomas Bainbridge, and Henry Bainbridge, in the said High Court of Chancery, which said bill was then directed to the Right Hon. *Charles Christopher* Baron *Cottenham*, of *Cottenham*, in the county of *Cambridge*, then Lord High Chancellor of Great Britain, and by which said bill the said Edward Joseph Christian *did state*, amongst other things, that James Fanning, formerly of the city of Paris, in the kingdom of France, but then deceased, was in his lifetime, and at the time of making his will, and of his death thereafter mentioned, possessed of an estate in France called the Estate of La Roche Tabbot, and was also possessed of and interested in and entitled to personal estate to a very considerable amount and value." "And that the said James Fanning, being so possessed and entitled, did, when of sound and disposing mind, memory, and understanding, duly make and publish his last will and testament in writing, bearing date on or about the eighteenth day of January, in the year of our Lord one thousand eight hundred and two."— [It then recited the whole of the defendant's bill in Chancery, including the prayer of it.] The indictment then went on to state, that on the 2nd of July, 1841, the said E. J. Christian "did exhibit his certain petition in writing in the said Court of Chancery, directed to the said *Charles Christopher* Baron *Cottenham*, then Lord High Chancellor, intituled in the said secondly above-mentioned cause, and also in a cause in the said High Court of Chancery, in which the said commissioners were the plaintiffs, and the said James Edward Devereux, Elizabeth Reardon *and others*, were defendants, being the cause so revived by the order of the 18th day of July, 1827, above mentioned; and

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in and by the said petition the said Edward Joseph Christian did state the said matters and things so stated in the said bill of complaint so exhibited by him as aforesaid; and by the said petition the said Edward Joseph Christian prayed the said then Lord High Chancellor, that it might be declared and ordered that the sum of 46,286*l.* 14*s.* 8*d.* Three per Cent. Annuities, standing in the name of the said Accountant-General, in trust in the said cause at the suit of the said Commissioners of Charitable Donations and Bequests in Ireland, ought not, or ought any part thereof, to be paid out or distributed to any persons or person, or in any manner, until the said cause of the said Edward Joseph Christian was heard and decided by the said High Court of Chancery; and that such payment or distribution might accordingly be restrained by the order of the then Lord High Chancellor." And that the defendant afterwards, to wit, on the 5th day of July, 5th Vict., at &c., "came in his proper person before William Russell, Esq., then and there, being one of the Masters of the said High Court of Chancery, and then and there before the said Master exhibited and produced the affidavit in writing of him the said Edward Joseph Christian *intituled* in the said Court of Chancery, and in the said suit therein at the suit of the said Edward Joseph Christian, and also in the said suit therein at the suit of the said *Commissioners* of Charitable Donations and Bequests in Ireland; and that the said Edward Joseph Christian, in due form of law, was then and there sworn and took his corporal oath, &c. The indictment set out the affidavit, and assigned perjury in it, and also contained averments of materiality, and that William Russell, Esq., had authority to administer the oath.

Mr. Neelor, a clerk of Messrs. Beavan and Anderson, produced a copy of the bill in Chancery, filed on the 3rd of May, 1822, by the "*Commissioners* of Charitable Donations and Bequests in Ireland" against James Edward Devereux, Daniel Reardon, Colin Alexander M'Kenzie

and James Newman; an examined copy of the bill of revivor mentioned in the indictment, a copy of the bill in Chancery filed on the 2nd of July, 1841, by the present defendant against "James Edward Devereux, the *Commissioners* of Charitable Donations and Bequests in Ireland, Elizabeth Beardon, Philip Davies, Michael Macarthy, Edward Thomas Bainbridge, and Henry Bainbridge;" and he stated, that he had examined each with the original. This witness also produced an examined copy of a petition by the defendant to the Lord Chancellor, of the same date as the last-mentioned bill, praying that the fund then in court should not be paid out of court till that suit was determined.

Mr. Anderson, of the Affidavit Office in the Court of Chancery, produced the affidavit of the defendant, which was proved to have been sworn by him on the 5th of July, 1841, before William Russell, Esq., the Accountant-General of the Court of Chancery.

This affidavit was intitled—"In Chancery, between the *Commissioner* of Charitable Donations and Bequests in Ireland against James Edward Devereux," &c. [naming the other defendants], "and between Edward Joseph Christian and James Edward Devereux, the Commissioners of Charitable Donations and Bequests in Ireland, *and others.*"

Kelly, for the defendant.—I submit, first, that there is a variance between the affidavit produced and the affidavit alleged in the indictment; and, secondly, that the affidavit is one on which perjury cannot be assigned. The indictment alleges the affidavit to be intitled in a cause in which the *Commissioners* of Charitable Donations and Bequests in Ireland are the plaintiffs, and the affidavit is really intitled in a cause in which the *Commissioner* of Charitable Bequests and Donations is plaintiff, which is a variance; and further, to be an affidavit on which perjury can be assigned it must have been made in a suit, and I say that

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this affidavit was not made in any suit, as there was no suit in which the *Commissioner* of Charitable Bequests was the plaintiff. It may be said, that the title of the second suit is correctly stated, but there another difficulty arises, as the indictment alleges the affidavit to have been produced in both suits, and a further question would arise as to whether the matters of the affidavit were material to one suit or the other. I submit, first, that there is a variance; and secondly, that, as there is no such suit as one of those in which the affidavit is intitled, it is extra-judicial, and no perjury can be assigned upon it.

Montagu Chambers, on the same side.—The indictment alleges this affidavit to be intitled in a cause in which the *Commissioners* are plaintiffs. It is not so intitled, and it is in fact in a cause which does not exist.

Thesiger, for the prosecution.—Your Lordship can allow an amendment, which will at once put an end to the objections as to the variance; and if no perjury can be assigned on an affidavit in which the party making it omits a letter in the title of it, the most dangerous consequences would ensue.

LORD DENMAN, C. J.—I will strike out the word “intitled.”

Kelly.—The second suit is improperly described in the affidavit, as it describes the defendants in it as “the Commissioners of Charitable Donations and Bequests in Ireland, and others.” Now the rule is, that no affidavit can be received which is not intitled in the cause, and in the title of which the names of all the plaintiffs and defendants are not stated; and this clearly appears from the cases of *Doe d. Spencer v. Want (a)*, *Bullman v. Callow (b)*, Mr. Chitty’s note to that case, and from the case of *Tom-*

(a) 2 J. B. Moore, 722.

(b) 1 Ch. Rep. 727.

kings v. Geach and others (c). And in the case of *Owen v. Hurd* (d), Lord *Kenyon* said that he remembered an instance where, there being no title to the affidavits in the cause, the court said they could not take any notice of them, even though the counsel on the other side did not wish to take the objection.

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Lord DENMAN, C. J.—All those authorities go merely to the non-reception of the affidavits. The courts are quite right in not receiving affidavits which are not properly intitled; but I do not think the question whether there be perjury or not depends on the rule as to intitling being strictly complied with (e).

Thesiger, for the prosecution, proposed to have the copy of the bill in Chancery, filed on the 3rd of May, 1822, read.

This copy contained a great number of abbreviations, such as, "*possd. of considble. pnl. este.*," and the like, and had all the dates in figures.

Mr. Neelor stated, that the copy produced was an office copy of the original bill, but that in the original bill all

(c) 5 Dowl. P. C. 509.

(d) 2 T. R. 643.

(e) In the case of *Bill v. Bament*, 8 Mee. & W. 317, where an affidavit had been sworn in the usual way at the judge's chambers, but through mistake it was not laid before the judge, and therefore the jurat was not signed by him, *E. James*, arguendo, said, "Perjury may equally be assigned upon the affidavit, although the judge's signature be omitted," as to which Baron *Al-derson* said, there was "no doubt." In the case of *R. v. Hailey*, 1 C. & P. 258, Mr. Justice *Little-dale* held, that an indictment for perjury

might be supported against a marksman for swearing falsely in an affidavit, though it would not be receivable in the court it was sworn in, because the jurat did not state that it had been read over unto the party swearing it, but that the person administering the oath must prove that the party swearing it in fact understood its contents: and his Lordship also held, that the perjury is complete at the time of the swearing of the affidavit; and whether it is receivable in the court or not is immaterial, if the reason why it is not receivable is, that some formal regulation is not complied with.

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the words were written at full length, and all the dates expressed by words.

Kelly.—I submit that the paper produced is not a copy of the original bill in Chancery; certain abbreviations and signs are substituted for words, and these, too, are some of them ambiguous; the letters p n l. may mean either the word "personal" or the word "professional;" and if abbreviations are to be admitted, symbols might be used, and there would be no reason why the copy might not be taken in short-hand. I submit, that nothing will do but what the witness can swear to be a correct copy of the original, which the witness says this is not.

M. Chambers.—The witness has not said "this copy is exactly like the original," but has said "this is not like the original because there are *words* in the original and *contractions* in the copy." Public convenience alone dispenses with the production of the original instrument, but public convenience does not say that you can produce that which is not a full and perfect copy. Office copies are not allowed, probably because there should be proof of a full and perfect copy of the original. Suppose that the instrument purported to set out a will or a bill of exchange, the words and even the spelling might be most material, and if the production of the original document is dispensed with, there is no hardship in requiring that a full, true, and perfect copy should be produced in its stead.

Thesiger, for the prosecution.—These are all known abbreviations, and are all perfectly well understood. In the case of *Reynolds v. Caswell* (g), it was held, that an attorney might put in his bill of costs such abbreviations of English as were usual and intelligible, such as "*Incons.*" for declaration, *fo. 18.*"—" *Lres.*"—" *Pd.*"—" *Serjt.*"—" *Atty.*" and the like, and yet by the stat. 12 Geo. 2, c. 13, s. 5, he

(g) 4 Taunt. 193.

is only permitted to use such abbreviations "as are now commonly used in the English language," which the abbreviations "*Incons.*" and "*Lres.*" certainly are not.

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Bodkin, on the same side.—A fac-simile of the bill is not required. The indictment states, that the bill in Chancery stated certain things; to prove that, this paper was compared with it, and is correct, the abbreviations in the one being words at length in the other. This is at least evidence to go to the jury, that the bill did contain that which is alleged.

Kelly.—If it were not to render the copy strictly conformable to the original, there seems to be no reason for requiring the copy to be examined with the original; and if then abbreviated copies are allowed, the judgment of the witness, or perhaps his recollection, will be substituted for the eyes of the jury. The witness does not say that this is a copy, but only that it is equivalent to a copy.

Lord DENMAN, C. J.—The witness has stated, that the words abbreviated in the copy were written at length in the original; the copy, in that respect, therefore, is unlike the original. We might ask the witness as to his memory of the words in the original, but I think we ought not to do so. I am of opinion that the objection must prevail, and that the defendant must be acquitted.

Verdict—Not Guilty.

Thesiger, *Clarkson*, and *Bodkin*, for the prosecution.

Kelly and *Montagu Chambers*, for the defendant.

[Attornies—*Beavan & Anderson*, and *Lewis & Lewis*.]

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Dec. 7th.

KEMP v. KING.

The declaration in an action for maliciously suing out a fiat in bankruptcy, contained an allegation that it was ordered by the Court of Review, "that the said fiat should be annulled, and the same was accordingly thereby then annulled, and the proceedings on the said fiat were thereupon ended and determined."

The order of the Court of Review was, that the fiat "be annulled, if the Right Hon. the Lord Chancellor shall think fit," and at the foot of it was a confirmation of it signed by the Lord Chancellor.—*Held*, that the allegation was substantially proved.

A judge at Nisi Prius will not compel a witness to produce a document under a subpoena duces tecum, if, as against the party asking its production, the witness has a lien on the document which is called for.

CASE for maliciously suing out a fiat in bankruptcy against the plaintiff. The averment that the fiat had been annulled was as follows: "and the plaintiff saith, that the said fiat, and all the proceedings thereon, and under the same, were wholly unjust and untenable, and that such proceedings were thereon had, that afterwards, to wit, on the 26th day of March, 1841, a petition of the plaintiff before then made to the Right Honourable the Chief Judge, and their Honors the other Judges, of Her Majesty's Court of Review in bankruptcy, praying, amongst other things, that their Honors would order the said fiat to be superseded at the expense of the defendant, and that a writ of superseas might forthwith issue for that purpose; and it was ordered by the said Court of Review in bankruptcy, that the said fiat should be annulled at the expense of the defendant, and the same was accordingly thereby then annulled, and the proceedings on the said fiat were thereupon ended and determined." The declaration was, in other respects, in the usual form. Pleas—first, not guilty; and secondly, "that it was not ordered by the said Court of Review in bankruptcy, that the said fiat should be annulled in manner and form as the plaintiff hath above thereof alleged" (concluding to the country).

On the part of the plaintiff, the order for superseding the fiat in bankruptcy, which had issued against the plaintiff, was put in; it was as follows:—

"In Bankruptcy. }
Court of Review. }

Friday, the 26th day of
March, 1841.

"In the matter of William Richard Kemp, a bankrupt.

"Whereas, William Richard Kemp did, on or about the 1st day of March, 1841, prefer unto this Court his petition in the above matter, praying, that the said Court would be pleased to order the fiat mentioned in the said petition to

be superseded at the expense of John King, the petitioning creditor, and that a writ of supersedeas might then forthwith issue for that purpose, and that the bond which had been entered into by him might be assigned to the said petitioner, and that he might pay the costs of the said application. Now, upon hearing the said petition, and the several affidavits filed in support thereof and in opposition thereto, read, and what was alleged by Mr. Swanston and Mr. Koe, of counsel for the said petitioner [naming the different counsel in the case, and the parties for whom they respectively appeared], this Court doth order that the fiat awarded and issued against the said William Richard Kemp, by the name and description of William Richard Kemp, late of Eastcheap, in the city of London, wholesale grocer and tea-dealer, dealer and chapman, and bearing date on or about the first day of February last, be annulled, if the Right Honourable the Lord Chancellor shall think fit: and it is ordered, that the costs of annulling the said fiat, and incidental thereto, and also the costs of the said petitioner of and occasioned by this application, be paid by the said John King to the said petitioner, or to Mr. James Thomas Cookney, his solicitor: and it is hereby referred to the rotation Master of the Court of Chancery, or the vacation Master of the said last-mentioned Court, to tax the said costs between the parties, if they differ about the same.

“W. B., Reg.

“By the Court.”

“2nd April, 1841.

“Upon reading the above order, I hereby confirm the same, and direct that the fiat therein mentioned be, and it is hereby annulled accordingly.

“Entered, H. S.

“COTTENHAM, C.”

On the part of the plaintiff, Mr. Heathcote was called upon, under a subpoena duces tecum, to produce a deed between the plaintiff of the one part, and Mr. Clark of the other part. Mr. Heathcote objected to producing it, stating,

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that he had a lien on it. He stated that he had a lien upon it as against the present plaintiff.

Erle, for the plaintiff.—I submit that the witness is bound to produce the deed, as by the production of it he would not lose his lien.

Lord DENMAN, C. J.—If he puts it in when you call for it he in effect parts with the lien which he has on it, as against your client; I shall not compel him to produce it.

The deed was not produced (*a*).

Kelly, for the defendant.—The second plea is, that the fiat was not annulled modo et formâ as stated in the declaration, and the declaration states that it was annulled by the Court of Review, which Court has no power to annul a fiat in bankruptcy, and has not done so in the present instance, as the Court of Review has only made a conditional order that the fiat shall be annulled if the Lord Chancellor shall think fit.

Bramwell, on the same side.—The second plea in substance traverses the allegation in the declaration, that the fiat was annulled by the Court of Review. From the 17th and 19th sections of the Bankruptcy Court Act, 1 & 2 Will. 4, c. 56 (*b*), it is clear that the Court of Review has no power to annul a fiat, and even where the Court of Review are to reverse the adjudication, the Lord Chancellor is to annul the fiat.

(*a*) See the case of *Thompson v. Mosley*, 5 C. & P. 501, in which Lord *Lyndhurst*, C. B., held that a person having a lien upon a document is no objection to his producing it on a trial at Nisi Prius; but that, if he fears it may be abstracted, the judge will allow him

to stand by the witness while the witness is examined respecting it. In that case it did not appear that the witness claimed any lien as against the person requiring the production of the document.

(*b*) Set out in *Flath. Arch. B. L.*, pp. xc, xci.

Lord DENMAN, C. J.—It seems to me that the issue is substantially proved on the part of the plaintiff. If the annulling of the fiat is not sufficiently stated in the declaration, the objection is on the record.

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At the end of the plaintiff's case, Lord *Denman*, C. J., being of opinion that a want of probable cause was not shewn,

Erle, for the plaintiff, elected to be nonsuited.

Nonsuit.

Erle and *E. James*, for the plaintiff.

Kelly and *Bramwell*, for the defendant.

[Attornies—*J. T. Cookney*, and *Templer & Co.*]

BAKER v. WILKINSON.

Dec. 9th.

LIBEL.—The declaration stated that the defendant had published a libel of the plaintiff, in a newspaper called “The Leicester Herald and Midland Counties Advertiser.”
Plea—not guilty.

In an action for a libel in a newspaper, a certified copy of the Stamp-office declaration was put in, which stated the title of the newspaper to be “The Leicester Herald and Midland Counties Advertiser,” and the intended place of publication to be “No. 23, Charles-street, in the parish of Saint Margaret, in the borough of Leicester.”

To prove the publication of the libel by the defendant, a certified copy of the declaration from the Stamp-office was put in. In this the title of the newspaper was stated to be “The Leicester Herald and Midland Counties Advertiser,” and the intended place of publication of the newspaper was stated to be “No. 23, Charles-street, in the parish of Saint Margaret, in the borough of Leicester.”

A copy of the newspaper was offered in evidence, the

ret, in the borough of Leicester.” The newspaper containing the libel had the same title, but the place of publication in the imprint at the end of it was, “at the corner of Charles-street and Hadfield-street, in the parish of Saint Margaret, in the borough of Leicester.”

Held, that this sufficiently shewed the identity of the newspaper, so as to allow it to be given in evidence under the 8th sect. of the stat. 6 & 7 Will. 4, c. 76.

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name of which agreed with that in the Stamp-office declaration, but the place of publication in the imprint at the end of the newspaper was stated to be "at the corner of Charles-street and Hadfield-street, in the parish of Saint Margaret, in the borough of Leicester."

Kelly, for the defendant.—I submit that this newspaper cannot be given in evidence, as the place of publication on the newspaper itself does not tally with the place of publication mentioned in the Stamp-office declaration, and, according to the former, the place of publication might be in Hadfield-street. The provisions of the stat. 6 & 7 Will. 4, c. 76(a), are of a highly stringent and almost penal nature, and ought not to be extended to cases which are not clearly within the terms of that statute.

Whitehurst, on the same side, referred to the case of *Rex v. Franceys* (b).

(a) By sect 8 of that statute, it is (inter alia) enacted, that if a certified copy of the Stamp-office declaration and a newspaper intitled in the same manner, and "wherein the name of the printer and publisher, and the place of printing, *shall be the same* as the name of the printer and publisher, and the place of printing mentioned in such declaration, *or shall purport to be the same*," "it shall not be necessary for the plaintiff, informant, or prosecutor, in any action, prosecution, or other proceeding, to prove that the newspaper to which the suit, action, prosecution, or other proceeding may relate," was purchased of the defendant, or at his house, &c.

(b) 2 A. & E. 49. In that case it was held, that, on a motion for a cri-

minal information for a libel, published in a newspaper, if the Stamp-office affidavit under the stat. 38 Geo. 3, c. 78, be put in to shew that the defendant is the printer and publisher, such proof is not sufficient, unless the newspaper produced as containing the libel correspond with the description in the affidavit, not only in title, but in the name of the place of printing; and where the place of printing was called Union-street, Castle-street, in the affidavit, and Union-buildings, John-street, in the newspaper, the Court discharged a rule for a criminal information, and would not enlarge it, in order that supplemental affidavits might be filed, shewing that the places named were identical.

Follett, S. G., for the plaintiff, submitted that the identity of the place of publication sufficiently appeared.

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LORD DENMAN, C. J.—I think that the evidence of identity is sufficient, and that the newspaper may be given in evidence.

The newspaper was put in, and the article charged to be libellous was read.

It afterwards appeared from the evidence, that the house at which the newspaper was published, which was at the corner of Charles-street and Hadfield-street, was No. 23, Charles-street.

Verdict for the plaintiff.

Follett, S. G., *M. D. Hill*, and *Hugh Hill*, for the plaintiff.

Kelly and *Whitehurst*, for the defendant.

[Attornies—*Clowes & Wedlake*, and *W. H. Smith*.]

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KENDILLON v. MALTBY, Esq.

The dismissal by the police commissioners of a police constable, in consequence of a report duly made to them of a censure uttered on such police officer by a justice of the peace, is in itself sufficient evidence of special damage to sustain an action against the justice.

In such an action evidence of malice is necessary; for it is the duty of the justice to express his opinion of the conduct of police constables, in order that the police commissioners may have proper information on which to proceed in making inquiries to enable them to regulate the force under their direction.

SLANDER.—The declaration stated, that, before the committing of the grievances by the defendant, the plaintiff was a constable in the Metropolitan police force, and that the defendant was, and still is, one of her Majesty's justices of the peace assigned to keep the peace in and for the county of Middlesex, and a police magistrate appointed to sit at the police court, Great Marlborough-street: that on the 21st of June, 1841, the plaintiff, in discharge of his duty, appeared before the defendant as such police magistrate, and gave evidence against one Thomas Woolridge, whom the plaintiff had, in the due discharge of his duty, taken into custody for having committed a breach of the peace; and that on the 3rd of July, 1841, a charge and complaint was made and preferred against certain persons, to wit, one Sir Thomas Moncrieffe and Montagu Ormsby, before the defendant as such police magistrate, and the plaintiff, in the discharge of his duty as such police constable, gave his evidence before the defendant in proof and support of the last-mentioned charge, yet the defendant, contriving &c., on &c.," on the occasion of the last-mentioned charge and complaint made and preferred before him the defendant as such police magistrate as aforesaid, and in relation thereto, wantonly, wickedly, and maliciously, and without any reason or probable cause whatsoever, spoke and published, in the presence and hearing of divers good and worthy subjects of this realm of and concerning the plaintiff, and of and concerning him as such police constable and a serjeant as aforesaid, and of and concerning the before-mentioned charges and complaints, and the evidence given by the plaintiff as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say: "I (meaning the defendant) feel myself bound to say, with reference to this charge (meaning the said charge against the said Sir

T. M. and M. O.) and one before me a few days before from the same spot (meaning the said charge first above mentioned and referred to), I (meaning the defendant) do not believe serjeant Kendillon (meaning the plaintiff) on his oath." "By means of the committing of the said grievances, and on no other account whatsoever, the plaintiff has been dismissed and discharged from his said situation and employment of a police constable and serjeant as aforesaid," and has not only lost the pay, &c. which would have accrued to him, but hath thence hitherto remained out of employment. Plea—not guilty "by statute."

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It was opened by *Kelly*, for the plaintiff, that on the 21st of June, 1841, the plaintiff, in the discharge of his duty, brought before the defendant a person named Woolridge, whom he charged with having assaulted him while he was engaged in apprehending two women of ill fame who had been disorderly. The defendant heard the charge, and, though the appearance of the plaintiff shewed that he had been assaulted, dismissed the complaint. So far, whatever he might think of the decision, the law gave the plaintiff no right to complain. Some days afterwards, namely, on the 29th of June, the plaintiff brought a charge before the magistrate against two persons, Sir T. Moncrieffe and Captain Ormsby, whom he accused of being drunk and disorderly, and of having assaulted him. The hearing was put off for a day or two on account of the absence of Captain Ormsby, who was compelled by military duty to be elsewhere; but when he appeared the magistrate heard the statement of the plaintiff, which was made on oath, asked for further evidence, took the unsupported statements of the two persons charged against the sworn statement of the plaintiff, and dismissed, as too slight to be entertained, the charge as against Sir T. Moncrieffe, and as against Captain Ormsby only fined him 5*s.* for being drunk, and 5*s.* more for the assault. Having thus disposed of the case, with regard to which, however the plaintiff might consider him-

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self ill-treated, the law gave him no remedy, the magistrate proceeded to utter the words now the subject of complaint. They were to this effect: that in reference to this affair, as well as to that which had been brought before him a few days previously from the same spot, by which he meant to indicate the charge against Woolridge, he could not believe the plaintiff on his oath. This was an extra-judicial assertion, and was therefore actionable. The assertion was reported to the commissioners of police, and the plaintiff was dismissed.

On the part of the plaintiff, Charles Baker, an inspector of the C division of police was called. He said, "I know the plaintiff; he was a serjeant in the police force in June, 1841. On the 29th of June a charge was made by the plaintiff, at the station-house in Vine-street, against Sir Thomas Moncrieffe and Mr. Ormsby; they were charged with assaulting the plaintiff, and Mr. Ormsby was also charged with being drunk. They were bailed, and on the next day, which was a Tuesday, I attended before the defendant. The case was adjourned to the Thursday, when Sir T. Moncrieffe, on going before the defendant, accused the plaintiff of smoking and being a blackguard. The defendant said (after hearing Sir T. Moncrieffe), that he was compelled to disbelieve the plaintiff. The case was postponed for further evidence, and on the following Saturday all the parties appeared again before the defendant, when the charge against Sir T. Moncrieffe was dismissed, and Mr. Ormsby fined 5s. for assaulting the plaintiff, and 5s. for being drunk; and immediately afterwards the defendant said 'I am bound to say, in reference to this charge and a similar one brought from the same spot a few days before, I cannot believe William Kendillon on his oath.' I forwarded a report of what had occurred through my superintendent, Mr. Baker; but I was not present at any inquiry before Mr. Mayne, the commissioner of police."

This witness also stated, that it was after the defendant

had imposed the fine that he made use of the expressions before mentioned.

It was proved by inspector Beresford of the C division of police, that he had taken the charge against Woolridge, had attended on the following morning before the defendant, and had then heard the statement of the plaintiff; and that a police constable, who had been on duty with the plaintiff, was sent for by the defendant, and his statement of the facts did not agree with that of the plaintiff. The plaintiff's face was bleeding when he charged Woolridge with the assault.

It was proved by Mr. Mayne, the commissioner of police, that he had received the report of inspector Baker as to what had taken place before the defendant. He had made known the charge to the plaintiff, and had then informed him, that, in consideration of his having been in the police force for nearly eight years, and of his good conduct on several occasions, he should be allowed to resign. This the plaintiff refused to do, and the witness dismissed him.

In his cross-examination, Mr. Mayne stated that he did not dismiss him altogether on account of this statement of the defendant. There had been two cases of complaint against him before. They became known, not from any complaints from magistrates, but from the fact that the owners of some dogs, which had been stolen and restored, had brought or sent money to the police-office for the plaintiff. Whatever accusation was made by a magistrate or any one else against a policeman, he was at once made acquainted with it. That had been done in this instance.

Follett, S. G., for the defendant.—I submit that the plaintiff must be nonsuited. First, this being an action for words not imputing an indictable offence, special damage must be proved. The only special damage shewn is the discharge of the plaintiff by the commissioner of police; but that being the act of a third party, not present at the speaking of the words, and only hearing them

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at second-hand from the report of a person present, is not such an immediate result of the speaking of the words as will sustain an action. In the case of *Ward v. Weeks* (a) it was held, that the person who spoke words of another was not answerable for special damage occasioned by a person repeating the words to a third party, as being the statement of the original speaker. Secondly, this is an action against a judicial officer for words spoken in the course of his duty, and for such words no action will lie.

(a) 4 M. & P. 796. In that case, (which was an action for slanderous words, in which in the declaration it was alleged for special damage, that by reason of committing the grievance one John Bryer refused to give the plaintiff credit), the evidence was that the defendant spoke the words to Edward Bryce, and that Bryce communicated the statement as the statement of the defendant to Bryer, who thereupon refused to trust the plaintiff. The Court held that the allegation was not supported, and Lord Chief Justice Tindal in delivering the judgment of the Court said, "The substance of the plaintiff's allegation is, that by reason of the defendant's false representations to divers persons, one John Bryer refused to trust the plaintiff. Now the evidence necessary to support this allegation would have been either that John Bryer was present and heard the defendant make the representations to some person, or, at the very least, that when the defendant made such representations he directed them to be communicated to Bryer; but neither of these suppositions exists in fact; on the contrary, the evidence was that the words were ad-

dressed to one Edward Bryce, and that Bryce, at a subsequent time and place, and without any authority from the defendant, repeated the representations to Bryer, the repetition of which words, and not the original statement, occasioned the plaintiff's damage. Every man must be taken to be answerable for the necessary consequences of his own wrongful acts; but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words, for no effect whatever followed the first speaking of the words to Bryce. If he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage: we therefore think that as each count in the declaration alleges, as the only grievance, the original false speaking of the words, the allegation, that 'by reason of committing such grievance, Bryer refused to give the plaintiff credit,' is not made out by the evidence."

This clearly appears from the case of *Hodgson v. Scarlett* (b), the dictum of Lord *Mansfield* in the case of *Rea v. Skinner* (c), and the case of *Jekyll v. Sir John Moore* (d). And thirdly, the defendant is protected by the Magistrates' Act, unless there were malice and a want of reasonable and probable cause, of which there is no evidence.

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Kelly, for the plaintiff.—The discharge of the plaintiff was in consequence of and the result of a report which it was the duty of the inspector of police to make to his superiors, and that distinguishes the present case from that of *Ward*

(b) 1 B. & A. 232. In that case it was held, that an action for defamation will not lie against a barrister for words spoken by him as counsel in the cause, pertinent to the matter in issue.

(c) *Lofft*, Rep. 55. This was a motion to quash an indictment against — *Skinner*, Esq., one of his Majesty's justices of the peace for the town of Poole, for scandalous words spoken by him in a general sessions of the county, in which he said to the grand jury—"You have not done your duty; you have disobeyed my commands; you are a seditious, scandalous, corrupt, and perjured jury." Lord *Mansfield*, C. J., said, "I am willing, as neither Serjt. *Davy* nor Mr. *Buller* can find any precedent in the history of England for an indictment of this kind, to give them till next term to find any." "Neither party, witness, counsel, jury, or judge can be put to answer civilly or criminally for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt, and examine on information. If any thing of

mala mens is found on such inquiry, the words will be punished suitably. The words are extremely improper. If the party were not a borough justice, I should think there might be grounds to apply to the Great Seal to remove him from his office, but to go on an indictment would be subversive of all ideas of a constitution. If any precedent should be found you should have time to make use of it, otherwise it would be proper to quash the indictment immediately."

(d) 2 N. R. 341. In that case it was held, that if a court-martial, after stating in their sentence the acquittal of an officer, against whom a charge had been preferred, subjoin thereto a declaration of their opinion that the charge is malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused is highly injurious to the service, the president of the court-martial is not liable to an action for a libel for having delivered such sentence and declaration to the judge advocate. See also the case of *Doyle v. O'Doherty*, post, p. 418.

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v. *Weeks*, in which the Court of Common Pleas expressly decided upon the ground that the repetition of the slander which caused the special damage, was the *voluntary act of a free agent*.

Lord DENMAN, C. J.—I think there is sufficient evidence of special damage.

Kelly.—With respect to malice, I submit that there is abundant evidence to go to the jury of malice in the legal sense of that word. The words were uttered after the justice had adjudicated on the case brought before him. His jurisdiction was at an end. It makes no difference in point of law, that the observations were made immediately after the decision of the case; they were made after it, and they therefore became the observations of an ordinary person, made without any legal necessity, and therefore without any legal justification. They were the mere words of a private person, and, being in their nature injurious to the plaintiff, must be treated in law as malicious.

C. Clark, on the same side.—There is in the conduct of the defendant sufficient to constitute legal malice. The plaintiff made on oath a charge before him; the defendant required evidence by other persons in support of that charge. That evidence was given, and it confirmed the statement of the plaintiff. The defendant thereon convicted one of the accused parties, and as to the other, not affecting any longer to doubt the statement of the plaintiff, he merely said that the facts amounted to so slight a charge that he should not entertain it. He therefore admitted that what was thus stated by the plaintiff was true, and acted on it as true, and yet, immediately after doing so, he used the expressions now complained of, that he did not believe the plaintiff on his oath. This is clearly sufficient to constitute legal malice.

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Lord DENMAN, C. J.—I have no doubt on my mind, that a magistrate, be he the highest judge in the land, is answerable in damages for slanderous language, either not relevant to the cause before him or uttered after the cause is at an end; but for words uttered in the course of his duty no magistrate is answerable, either civilly or criminally, unless express malice and the absence of reasonable or probable cause be established. In the present case I am of opinion that there is no proof of malice; there has been nothing to shew that the decision of the defendant was influenced by any improper feeling. He only did his duty in fully investigating each case brought before him. He was not bound to believe every charge made by a police officer; he was bound to examine it; he has done so here, and he has acted on the result of that examination. If he believed that the plaintiff had given untrue evidence, he was bound to say so. He was not only excused, but considering what is the constitution of the police force, and what the duties of the two commissioners who regulate it, he was actually bound to state his real opinion of a policeman's conduct and testimony, that the commissioners might be able to perform their duties correctly and efficiently. There is no legal cause of action in this case, and the plaintiff must be nonsuited.

Nonsuit.

Kelly and *C. Clark*, for the plaintiff.

Follett, S. G., *Thesiger*, *S. Martin*, and *Willes*, for the defendant.

[Attornies—*A. Warren*, and *Bazendale & Co.*]

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Dec. 10th.

REGINA v. GORDON.

An allegation in an indictment for perjury, that judgment was "entered up" in an action is proved by the production of the book from the Judgment-office in which the indictment is entered.

A defendant in an indictment for perjury, tried at the sittings in Queen's Bench, was arrested on the Wednesday before the trial, as he was going to the chambers of his counsel to deliver his brief. The case was called on for trial on the Saturday, and the Lord Chief Justice would not postpone it unless it could be shewn that the arrest was by collusion with the prosecutor; and the fact that a witness for the prosecution stood by while the arrest took place, is not sufficient to raise that inference.

PERJURY.—The indictment charged the defendant with having committed perjury in an affidavit to oppose a summons to set aside a judgment obtained by the present defendant against the prosecutor, Mr. Havers. Some of the counts of the indictment contained an allegation, that the present defendant "caused to be entered up final judgment in the said action."

When the case was called on for trial, on Saturday, December the 10th, and before the jury were sworn, *Hoggins*, for the defendant, applied to put off the trial, on an affidavit, which stated, that the defendant was arrested on the previous Wednesday on his way to the chambers of his counsel—as he was going thither to deliver his brief.

Lord DENMAN.—Is any practice imputed to the other side?

Hoggins.—The affidavit of the defendant states, that a person, who is to be one of the witnesses for the present prosecution, stood by while the arrest took place.

Lord DENMAN, C. J.—That is not sufficient. The case must come on.

The case was tried (*a*), and in support of the allegation in the indictment, that judgment was "entered up" in the original action, a clerk in the Judgment-office was called. He produced the book from that office, in which judgments are entered up, and stated, that interlocutory judgment

(*a*) On a subsequent day, at Guildhall, the same defendant and others were tried on a charge of conspiracy arising out of the same transaction. *Montagu Chambers* moved to put off the trial, on the

ground of the defendant's arrest as above mentioned, but Lord Denman, C. J., refused to postpone the trial unless it could be shewn that the arrest was made by collusion with the prosecutor.

was signed in the action *Gordon v. Havers*, on the 10th of March, 1842, and that final judgment was entered up on the 19th of that month.

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Hoggins, for the defendant.—I submit that this is not sufficient proof that final judgment was entered up. The proper proof is the production of the roll, or an examined copy of it, the words, “entering up” judgment, importing that which can only be proved by the record.

Thesiger, for the prosecution.—The “entering up” of final judgment always takes place before there is any roll carried in, and is the making of the entry which has been produced by the witness, and which he proves to have been made on the 19th of March. Probably, the present defendant, or his attorney, have never carried in any judgment roll, and if the “entering up” of judgment depended on the existence of a roll, this judgment could not have been “entered up” on the 19th of March, which the witness from the Judgment-office proves that it was.

Clarkson, on the same side, cited the case of *Fisher v. Dudding* (b).

(b) 9 Dowl. P. C. 872, and 10 Law J., N. S., C. P. 323. By the stat. 1 & 2 Vict. c. 110, s. 17, “Every judgment-debt shall carry interest at the rate of four per cent. per annum from the time of entering up of the judgment” “until the same shall be satisfied;” and the question in that case was, whether the “entering up of the judgment” was the entering of the incipitur in the paper book kept in the Master’s office for that purpose, or the subsequent entry of the judgment upon the roll. The Court of Common Pleas held, that the former, and not the latter, was the “entering up of the judgment;” and Mr. Justice *Maule* said—“There is a paper book in the office, in which the parties enter a sort of note of the judgment, which is called an incipitur. If a formal judgment is wanted, the record is made up from the entry in that paper book at any distance of time, but the incipitur is what is understood by the entering up of the judgment.”

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Lord DENMAN, C. J.—I think the evidence is sufficient.

Verdict—Guilty (c).

Thesiger, Clarkson, and Bodkin, for the prosecution.

Hoggins and C. Clark, for the defendant.

[Attornies—*Steele*, and in person.]

(c) No new trial was moved for, and it was stated by *Montagu Chambers*, for the defendant, when the defendant was brought up for judgment, that one reason why no motion was made on the point, as to the admissibility of the book from the

Judgment-office, was, that some of the counts in the indictment did not allege the entering up of the judgment in the original action, and therefore as to them the point did not arise.

Dec. 15th.

M'NAMARA v. GIBBS.

A defendant gave in evidence a letter of the plaintiff dated the 17th of January, which purported to be an answer to a letter written to the plaintiff by Mr. W. The plaintiff's counsel proved Mr. W.'s handwriting to a letter addressed to the plaintiff, and dated the 16th of February, but which had no post-mark, and wished to give this letter in evidence as being the letter to which that of the 17th was an answer.

DEBT for "service and attendance done and performed by the plaintiff for the defendant." Pleas—first, *nunquam indebitatus*; and second, payment.

The plaintiff's demand was for his services at the election of the defendant as one of the Bridge Masters of the City of London.

On the part of the defendant, a letter, written by the plaintiff to Mr. Wallis, dated the 17th of February, 1841, was put in. It commenced, "Dear Sir,—I feel both hurt and surprised at your letter," and then went on to state various matters respecting the election, and *inter alia* that the plaintiff had received the sum of £88.

A witness was called in reply, who proved the handwriting of Mr. Wallis to a letter, dated the 16th of February, 1841, addressed to the plaintiff. This letter had no post-mark.

Held, that the letter of the 16th was not receivable in evidence, unless it were shewn that it was the letter to which the plaintiff's letter was an answer, or, at least, that it was in existence before the date of the plaintiff's letter.

Kelly, for the plaintiff, proposed to give this letter in evidence, as being the letter to which the plaintiff's letter of the 17th of February was an answer.

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LORD DENMAN, C. J.—I do not think it is receivable in evidence, unless you can shew that it is the letter to which the plaintiff's letter was an answer, or, at least, that it was in existence before the date of the plaintiff's letter. Per se, this letter is not receivable in evidence at all, and it only becomes so by being shewn to be a letter to which the plaintiff's letter is an answer. For aught that appears, the letter may have been written yesterday (a).

Mr. Wallis was called. He stated that his letter of the 16th was the letter to which the plaintiff's letter of the 17th was an answer; and he also proved, that a letter in his hand-writing, of the 17th of February, was a reply to the plaintiff's letter of that date, which was already in evidence; and he also stated, that the £88, mentioned in that letter, was the amount of money paid out of pocket by the plaintiff, and not a payment to him for his services.

Both the letters of Mr. Wallis were read (b).

LORD DENMAN, C. J.—As Mr. Wallis explains this sum of £88 was for money paid by the plaintiff out of pocket, the plaintiff is clearly entitled to something more for his services.

Verdict for the plaintiff for £23.

Kelly and *Montagu Chambers*, for the plaintiff.

R. V. Richards and *S. Martin*, for the defendant.

[Attornies—*L. Norton*, and *Jones & B.*]

(a) See the case of *Gibson v. King*, post, p. 458.

(b) See the case of *Day v. Roe*, *Bart.*, 7 C. & P. 705.

1840.

COURT OF COMMON PLEAS.

Sittings in London in Michaelmas Term, 1840.

BEFORE MR. JUSTICE ERSKINE.

Nov. 21st.

RICHARDS v. TURNER.

On the trial of an action for assault and false imprisonment on a charge of felony, if the plaintiff's counsel ask his witness what was said by the defendant when the parties were before the magistrate, the defendant's counsel may ask, on cross-examination, what was said by the magistrate.

Where a plea of justification in such a case states, that the plaintiff committed the felony, the jury must try that question in the same way as if they were sitting in the Criminal Court trying the plaintiff for the offence itself; and if a witness, who admits that he stole similar property at the same time, be called to sustain the plea, though he is not exactly in the situation of an accomplice, yet it seems that his testimony ought to receive some confirmation.

THE declaration stated, that the defendant, on the 5th of July, 1839, assaulted the plaintiff, and forced him to go along certain public streets to a police station-house, and from thence to a certain prison, and kept and detained him in custody for a space of thirty hours, &c. &c. The defendant pleaded, 1st, not guilty; and, 2ndly, that, on the 6th of June, 1839, the plaintiff stole a piece of cloth of the value of 12s., the property of him the defendant, and that he thereupon gave him in charge to one John Dear, a police officer, and requested Dear to keep him in safe custody, and convey him before a magistrate, to be examined and dealt with according to law. The plea went on to state, that the police officer took the plaintiff into custody and conveyed him to the station-house and from thence to prison, and, as soon as conveniently could be, carried him before Sir Peter Laurie, one of the magistrates of London, by whom he was examined and discharged, and concluded thus:—"and by means of the premises, the plaintiff was assaulted and imprisoned, and kept and detained in prison for the said space of time in the said declaration mentioned, the same being a reasonable time for the purpose aforesaid, and lawful and just for the cause aforesaid," &c. The plaintiff joined issue on the defendant's plea of not guilty, and to the special plea replied *de injuriâ*.

The plaintiff was in the employ of the defendant as coffin-maker and undertaker in the year 1839, and a man named Wade was in the same employ. In the month of June in that year, the plaintiff having heard, from a person named Edwards, that Wade had been guilty of charging the defendant more than he had actually paid for articles which he was sent to purchase, informed the defendant of it, and the defendant, upon inquiry, found that the charge was true, and having missed various articles from the shop, told Wade that he suspected him of having stolen them, and that if he made a confession and gave the things back he would not prosecute him. Upon this Wade confessed that he had taken various things, and went to his lodgings in company with the defendant and a policeman, and there gave up to the defendant hoods, scarfs, coffin-nails, &c. He was then discharged from his employment; and the plaintiff continued to work for the defendant till the 3rd of the following month of July, on the evening of which day the defendant's wife accused him of having participated in the robbery committed by Wade, and the plaintiff immediately left the shop, and, after consulting his relatives, two letters were written by an attorney on his behalf, requiring "an immediate and full retraction of the slanderous words" used by the defendant's wife. No notice was taken of either of these letters; but on the 5th of July the plaintiff was taken into custody, and detained all night in The Compter, and taken the next day before Sir Peter Laurie, when, after some investigation, he was discharged out of custody.

One of the witnesses on the part of the plaintiff was asked, on his examination in chief, as to certain things suggested to have been said by the defendant when the parties were before the magistrate; and, in cross-examination, he was asked what the magistrate, Sir Peter Laurie, said.

Shee, Serjt., for the plaintiff, objected to the statements

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made by the magistrate. We did not ask what Sir Peter Laurie said, but what the defendant himself said.

Bompas, Serjt., for the defendant, submitted to his Lordship that he had a right to put the questions.

ERSKINE, J.—I think you have. They have asked as to some things that were said before the magistrate, and that makes all that passed before him evidence.

On the part of the defendant, Wade was called as a witness, and swore, that, while he and the plaintiff were at work on a coffin in the defendant's shop, and were using a roll of black cloth, the plaintiff said it was a nice piece of cloth and would make a nice pair of trousers, and that he tore off about two yards and took it away, and he, the witness, took away a similar piece. He also swore, that the plaintiff and himself had previously stolen a quantity of coffin-nails belonging to the defendant.

A police officer, named Dear, was also called as a witness for the defence. He proved the taking of the plaintiff into custody; and then said, "I told him that he was taken for taking a piece of cloth from Mr. Turner. I afterwards took him to The Compter; when I knocked at The Compter door, he said to me, 'Why does not Mr. Turner give Wade in charge for taking a piece of cloth at the same time as I took mine, for he took a piece of more value than I did?' The door of The Compter was by this time opened, and I said to him, 'I have nothing to do with that.' I took him before Sir Peter Laurie the following morning. The two letters were produced by Mr. Turner. Sir Peter first asked Mr. Turner, whether he meant to prosecute Wade; Mr. Turner said no; he had promised Wade he would not, by his telling him where the things were. Mr. Turner said he did not wish to prosecute Richards; a solicitor then rose, and said they intended to enter an action. Sir Peter Laurie said, 'A parcel of nonsense! no doubt they are both guilty;' and to the plaintiff he said, 'You are well off,' or something of that sort."

ERSKINE, J., in summing up, (after stating the declaration and pleas), observed :—There is no difficulty on the evidence as to the plea of not guilty. The question on the second plea will be, whether you are satisfied upon the evidence that the plaintiff was guilty of the felony; and you will now try that question in the same way as if you were sitting at the Old Bailey, trying the plaintiff for the offence itself. With respect to the witness Wade, he is not exactly in the situation of an accomplice examined on the indictment, because he has not the motive of saving himself by accusing another; but still he is a thief, and his character is tainted, and you would, probably, consider that his testimony required confirmation. The question as to him will be, was his statement made to revenge himself upon Richards for informing against him, or was it honestly and bonâ fide made? There certainly was great negligence in not searching for the property. [His Lordship then read the evidence of Dear the witness, and said:] If you believe Dear's evidence, then you will say what meaning you attach to the words which, he says, were used by the plaintiff, whether the plaintiff meant to admit his own guilt, or used them as a mere argument or reasoning with the officer. Certainly, if this confession was made, then the conduct before the magistrate is very inexplicable. It does seem very extraordinary, if the plaintiff knew he had made a confession the day before, that he should, after Turner had agreed to let him off, allow his solicitor to make the observation he did. If, upon the whole, you are satisfied that the plaintiff did commit the felony, then you will find your verdict for the defendant. If you are not satisfied of that, then you will consider what damages you will give the plaintiff.

Verdict for the plaintiff—Damages one farthing.

Shee, Serjt., and *Payne*, for the plaintiff.

Bompas, Serjt., and *Clarkson*, for the defendant.

[Attornies—*Ross*, and *W. C. Humphreys*.]

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1842.

Sittings in Middlesex after Hilary Term, 1842.

BEFORE MR. JUSTICE COLTMAN.

DOYLE, Knight, v. O'DOHERTY.

A. (the plaintiff) obtained a rule nisi for a criminal information against B. (the defendant) for sending him a challenge, and A.'s affidavits contained matters of high censure against B. The affidavit of B., in shewing cause against this rule, was recriminatory, and would, under other circumstances, have been libellous.

In an action by A. against B. for the libel contained in B.'s affidavit, it was held, that B. was justified in setting forth any such matters respecting A.'s past conduct as he might think would discline the court to entertain the application for A.'s rule.

LIBEL in an affidavit.—The declaration set out that the defendant, contriving and fraudulently intending to injure the plaintiff, did compose and publish the libel. But it did not contain the averment suggested by *Holroyd, J.*, in *Flint v. Pike* (a), namely, that where the libellous matter is uttered under circumstances which make it *prima facie* privileged, it should be stated to have been spoken maliciously, and without reasonable and probable cause. Pleas, not guilty; and that the subject-matter of the libel was true.

The defendant sent a challenge to Sir J. M. Doyle, the plaintiff, whereupon the plaintiff moved the Court of Queen's Bench for a criminal information against him. The affidavit, upon which the information was moved, set out the military services &c. of the plaintiff as colonel in the British army and K. C. B.; and, among other matters, it stated that the defendant had been dismissed from the British service by sentence of a court-martial, under circumstances which would in the opinion of officers and gentlemen disentitle him to attention in regard to any appeal, which he designated an appeal of honour. The defendant's affidavit, to shew cause against the rule, set out circumstances explanatory of his dismissal from the British service; and then went on to say, that "it ill became the said Sir J. M. Doyle to make any allusion to the said court-martial, for that the said Sir J. M. Doyle himself was, on or about the 1st of May, 1834, ignominiously dismissed the service

of his Imperial Majesty, Don Pedro, upon the complaint of his fellow-officers, who refused to sit down at the same table with him, in consequence of his having submitted to severe personal chastisement at the hands of General Bacon, on several occasions, without resenting the same." Upon this libel the action was brought.

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Knowles and *Miller*, for the defendant, submitted that the plaintiff must be called; because the libellous matter arose in the course of a judicial proceeding, and could not be the ground of an action, however false the assertions of the libel might be in fact; according to the doctrine in *Astley, Bart., v. Younge* (b). Nor was the libel in any way irrelevant to the affidavit of the plaintiff, which it proposed to answer; for all that the plaintiff ought to have done, in applying for the criminal information, should have been to set out to the Court the letter containing the challenge; but he goes further, and states voluntarily, that the defendant is not entitled to the satisfaction of a gentleman. This latter assertion was wholly irrelevant, and it was right for the defendant to set out all the circumstances in explanation of his conduct. What he says, therefore, clearly arises out of the affidavit of the plaintiff; and the defendant's affidavit in answer, far from being irrelevant, was effectual to its end, so as that the Court discharged the rule for a criminal information. The defendant was therefore justified in making that affidavit, because it was made in the course of a judicial proceeding. It will be urged that this libel was malicious, as set out in the declaration. At any rate, it is not alleged to have been without reasonable and probable cause, as suggested by *Holroyd, J., in Flint v. Pike* (c). Is it collateral and irrelevant? The Court of Queen's Bench is asked to exercise their extraordinary jurisdiction; and to further this end, there is a series of facts set out which calls for an answer:

(b) 2 Burr. 807.

(c) 4 B. & C. 480.

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among other things, the titles and honours of Sir J. M. Doyle. This might be considered to strengthen his credit, and to weaken that of the party against whom the information is moved: he disparages his conduct, too, and says, that he is not a gentleman. If these things be not answered, it would give an unfair advantage to the plaintiff. The affidavit, in answer, therefore goes on to say that Sir J. M. Doyle was in the same predicament as the defendant. In fact, the assumed libel is pertinent and relevant as affecting the credit of each of the parties, according to the ruling in *Trotman v. Dunn* (d).

Sir *T. Wilde* and *Talfourd*, Serjts., and *E. James*, contra. —It cannot be said that the rule was discharged, for the reason that the libellous matter here was an answer to the assertions of the plaintiff. The rule was discharged because the plaintiff shewed in his affidavit that the defendant, not being a gentleman, nor entitled to satisfaction at the hand of any gentleman, the Court was safe in not interfering, for there would be no breach of the peace. The Court interferes only to prevent a duel; not where they see that no duel will take place. The discharge of the rule, therefore, raises no presumption as to the pertinency of the defendant's affidavit. Neither is it law, that what is false may be stated in a judicial proceeding, or that counsel in the conduct of a cause may make any assertions they please. Counsel may not state what is irrelevant, as was said by *Holroyd, J.*, in *Hodgson v. Scarlett* (e). Applying the doctrine there laid down to the present case, where it shall appear that the libellous matter is irrelevant, an action will lie for it. It is irrelevant, because even if all that is said respecting the plaintiff having been

(d) 4 Campbell, 211. Where A. having summoned B., his master, before a court of conscience for wages, and B. when there utters words imputing felony to A. If this charge be necessary to B.'s defence, no

action can be maintained against him by A. for defamation; *aliter*, if the words be spoken maliciously, though addressed to the court.

(e) *Hodgson v. Scarlett*, 1 B. & Ald. 246. Per *Holroyd, J.*—"No

dismissed from the Spanish service were true, the plaintiff is still entitled to be protected by the Court from this challenge. The object of the affidavit therefore being to prevent the rule from being made absolute, the libellous matter is such as could not affect the judgment of the Court one way or the other. According to the ruling of Lord Mansfield in *Astley, Bart., v. Younge (g)*, so here; Is this libel anything but a collateral recrimination?

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COLTMAN, J.—I must decide for the defendant on the first plea. I cannot see that this, which is called a libel, is so irrelevant to the matter in the plaintiff's affidavit as is urged. This is an application to the Court of Queen's Bench for its extraordinary jurisdiction, to grant a criminal information against the defendant. The defendant in such case is not to have his hands tied; and he is justified in giving the best reasons he can why the Court should refuse the rule. He might think that the setting forth of these things, respecting the plaintiff's past conduct, would disincline the Court to entertain the rule. Had the matter been said on another occasion, no doubt it would have been highly libellous.

Nonsuit.

Sir *T. Wilde* and *Talfourd*, Serjts., and *E. James*, for the plaintiff.

Knowles and *Miller*, for the defendant.

action is maintainable against the party, nor, consequently, against the counsel, who is in a similar situation, for words spoken in a court of justice. If they be fair comments upon the evidence, and be relevant to the matter in issue, then, unless express malice be shewn, the occasion justifies them. If, however, it be proved that they

were not spoken bona fide, or if express malice be shewn, then they may be actionable; at least, our judgment in the present case does not decide that they would not be so." See the case of *Kendillon v. Malby*, ante, p. 402.

(g) *Astley, Bart., v. Younge*, 2 Burr. 810.

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Sittings at Westminster after Trinity Term, 1842.

BEFORE MR. JUSTICE ERSKINE.

June 17th.

STEEDMAN v. ROSE.

On a replication to a plea of infancy that the articles supplied were necessities, the question is not only whether the articles were of a kind that would be necessary to a person in the station of the defendant, but also whether the defendant had a sufficient supply of those articles at the time of the sale by the plaintiff, for, if he had, the goods supplied by the plaintiff were not necessities, and the plaintiff cannot recover for them; and if a party supply goods to one under age without ascertaining whether such person be already fully supplied with such articles, he does so at the risk of their being proved to be not necessary at the time of the supply, by reason of the person being already fully supplied with such articles, and of thereby failing in an action for the recovery of their price.

ASSUMPSIT by the plaintiff, as payee, against the defendant as drawer of a foreign bill of exchange. Second count, for goods sold and delivered. Third count, on an account stated.

Plea to the whole declaration, infancy.

Replication, as to the goods sold and delivered, that they were necessities, and, as to the residue, a denial of the infancy.

This action was brought to recover the sum of £60 for clothes, gloves, and other similar articles, supplied to the defendant, in the years 1832 and 1833, when he was an officer on board H. M. ship *Pelorus*, and it was proved that the defendant was the son of Sir George Rose, bart., M. P. for Christchurch.

For the defendant, witnesses were called who proved that when he joined the *Pelorus*, in the early part of 1832, as master's mate, he was supplied by his father with an outfit sufficient for three years, consisting of fifty-two pair of trousers, dress uniforms, and other things suitable to his station, and that he was born in the year 1814, and consequently was between eighteen and nineteen years of age when the goods were supplied. It was also proved that the defendant visited the Governor, Sir Lowry Cole, when at the Cape of Good Hope, and attended various balls and other parties at the Government House there.

Among the articles supplied were dress coats and other articles of dress, and a green veil, which was said to be used at the Cape to protect the eyes from the dust.

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ERSKINE, J.—There can be no reasonable doubt of the infancy of the defendant when these goods were supplied. The main question is, whether they were necessities or not. Now to determine that question it is certainly important to advert to the connexions and station in life of the defendant. He is proved to be the son of Sir George Rose, a gentleman of great distinction, and that he filled the situation of an officer on board one of Her Majesty's ships, the Pelorus, and consequently the articles supplied, which consisted of dress coats and other articles of dress, do not appear to be unsuitable to the defendant's station in life. But that is not the only consideration in determining the question whether these articles were necessities or not, for if it appears that the defendant was furnished with an abundant supply of such articles of dress as were suitable to his station at the time when these goods were supplied, they could not be necessities at that time. Now it is proved that in the early part of 1832, when the defendant joined the Pelorus, he had an abundant outfit, sufficient to have lasted for three years; and it does not seem that any casualty occurred on board the ship to render a further supply necessary upon the defendant's arrival at the Cape. There are some articles, such as gloves, the green veil, some repairs, and gold lace supplied in the course of them, which, at any rate, must be considered necessities, and for these I think the plaintiff is entitled to a verdict. As to the other things, the plaintiff might have known, if he had inquired of the captain of the ship, that the defendant was fully supplied with them. He certainly was not bound to make such inquiries; but not having done so, he takes the

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chance of their being proved not to be necessities at that time.

Verdict for plaintiff—Damages £50 (a).

Atcherley, Serjt., and *Stammers*, for the plaintiff.

Channell, Serjt., and *H. Hill*, for the defendant.

[Attornies—*H. W. Bull*, and *Frere, Forster, & Co.*]

(a) See the cases of *Cook v. Angerstein*, 6 C. & P. 690; and *Deaton*, 3 C. & P. 114; *Story v. Charters v. Boynton*, 7 C. & P. *Pery*, 4 C. & P. 526; *Burghart v.* 52.

Sittings in Middlesex after Trinity Term, 1842.

BEFORE MR. JUSTICE ERSKINE.

June 18th
& 20th.

PETTITT v. MITCHELL.

In the sale of certain lots of goods by auction, the conditions of sale prefixed to the auctioneer's catalogue were, among others, that the goods were to be paid for before delivery, and to be cleared off the premises by a certain day:—

Held, in the absence of evidence of a specific stipulation to that effect, that the law would not imply a custom that the purchaser should inspect and measure the goods knocked down to him before he paid for them; and that the words of the catalogue, 'before delivery,' meant before delivery for any purpose, whether to measure or to clear away. *Secus*, where the goods are bought by sample, in which case the purchaser has a right before payment to see that the bulk corresponds with the sample.

THIS was an action to recover damages for the loss sustained by the re-sale of certain articles, which the defendant had purchased on the 3rd and 4th of June, 1841, at an auction conducted by the plaintiff, and which articles, according to the conditions of sale, the defendant was to have removed on the 5th of June, 1841. He had not done so; and they had been re-sold, in pursuance of the conditions mentioned, and upon that re-sale there was a loss to the amount of the damages sought to be recovered.

The catalogue of sale, which was set out in the declaration, had, among others, the following condition and notification:—

4th.—"The lots must be taken away, with all faults, imperfections, or errors of description, at the purchaser's

expense, on Saturday, the 5th instant, after the sale; and the remainder of the purchase money to be paid before the delivery."

"Upon failure of complying with any of the above conditions, the deposit money shall be forfeited; the lots uncleared within the time aforesaid shall be re-sold by public or private sale; and the deficiency, if any, by such second sale, together with all charges attending the same, shall be made good by the defaulter or defaulters at this present sale."

At the head of the catalogue was the following announcement:—

"Mr. Pettitt begs to announce that the stock comprized in this catalogue has been measured to the yard's end, and will be delivered with all faults and errors of description. All the small remnants must be cleared at the measure stated in the catalogue."

The third and fourth pleas were to the effect that the goods were sold under other conditions beside those mentioned above, namely, that the purchaser should be allowed to inspect and measure the lots purchased before he should pay for them, or take them away.

The goods purchased, which consisted of several lots of woollen and linen drapery, were left in the auctioneer's warehouse till Saturday the 5th of June. On that day the defendant called for them, but wished to measure them previously to paying their price: the auctioneer's clerk refused to allow him to do so, and referred him to the conditions of sale. A disagreement arose thereupon, and the goods were left in the warehouse, and afterwards re-sold. Much evidence was given of the custom among auctioneers in cases of this sort, and of purchasers being allowed to measure the goods before taking them away; and for the defendant it was contended that although the purchase was on the conditions mentioned in the plaintiff's catalogue, yet there were other conditions, those, namely, set out in the third and fourth pleas, which were implied by law, or proved, as now, by the custom of the trade, and according

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to which he was justified in leaving the goods, when the auctioneer refused to let him measure them before the payment.

ERSKINE, J., (in summing up), said, as to the third and fourth pleas, it was very clear, that, by the contract of the parties, only the small remnants should be absolutely taken at the measurement in the catalogue; and, therefore, that other goods were to be subject to examination and measurement by the purchasers of them. And it was admitted that if there were any deficiency, the sale should not be vitiated, but a deduction should be made to the amount of the deficiency. The plaintiff said that the goods, according to the 4th condition, were to be paid for before they were delivered to the purchaser or examined or measured by him; and the defendant insisted that though they were to be paid for before delivery or removal, yet that he had a right before he paid to examine the goods, and see whether they corresponded in quantity and quality with those he had bought. The defendant was not bound to take any other article than that which he had bought. But it was for the jury to say whether there were evidence that the purchaser had a right to examine the different lots, and ascertain whether they had been rightly described in the quantity and quality before he paid his money. Shall the auctioneer have the security of the money in his hands before he gives the goods to the purchaser for inspection; or shall the purchaser have the security of the goods in *his* hands for inspection before he pays over the money to the auctioneer? The current of evidence was, that it was most convenient that the measurement should take place after the payment. But the jury must say whether there were circumstances here shewing that there is a custom which would engraft upon this sale the condition contended for, in the third and fourth pleas. [His Lordship then went over the evidence, and concluded as follows :—] That the questions for the jury were on the third and

fourth issues, whether it was one of the conditions of sale that the purchaser should be allowed to inspect, and examine, and measure each lot purchased by him, for the purpose of ascertaining if the same were of the proper quantity, quality, and description, according to the contract of sale, before the payment of the money? If the jury found in the affirmative the verdict should be for the defendant; and further, he asked whether they found any general custom of trade to allow the purchaser so to inspect, and examine, and measure the lots, where the goods are to be paid for on or before delivery, and where the purchasers are allowed deductions for deficient measure, and nothing is expressed in the conditions of sale as to the time or place of the measurement (a) ?

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Verdict for the plaintiff for the sum claimed.

ERSKINE, J.—Then you find that neither of the conditions set out in the third and fourth pleas were part of the terms and conditions agreed on between the parties?

The Foreman.—No. We take the catalogue.

Talfourd, Serjt., *Crompton* and *Wordsworth*, for the plaintiff.

Bompas and *Channell*, Serjts., and *Miller*, for the defendant.

[Attornies—*Stafford*, and *Fisher & De Jersey*.]

Afterwards, in Michaelmas Term, 1842, *Bompas*, Serjt., Nov. 13th.

(a) For cases in which certain acts amount to delivery and acceptance, see *Chaplin v. Rogers*, 1 East, 192, and *Elmore v. Stone*, 1 Taunt. 458. Sed per *Bayley, J.*, (in *Howe v. Palmer*, 3 B. & Ald. 324,) "In *Elmore v. Stone*, the buyer directed expense to be incurred; and the directing of that expense was considered evidence of an acceptance on his part. That case goes as far as any case ought to go, and I think we ought not to go one step beyond it. But I must say, however, that I doubt the authority of that decision."

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having obtained a rule nisi to enter a verdict for the defendant, the Court upheld the ruling of his Lordship; and they held that delivery, according to the terms of the catalogue, was contra-distinguished from "clearing away:" and, therefore, "delivery" meant delivery even for the purpose of inspecting or measuring; and, therefore, that payment must be before *such* delivery. They also distinguished this case from those of *Longman v. Smith* (b), *Howe v. Palmer* (c), and others, cited at the Bar, where the sale was by sample, in which case the purchaser had a right to see, before payment, that his purchase corresponded with the sample. Whereas here was the sale of a parcel of goods of a marked number, and for a certain and ascertained price; goods which had been measured; and the measurement was part of the description. They said, too, that with respect to the law implying such a custom as that contended for by the defendant, by reason of the convenience of trade, it was more for the convenience of trade, that the auctioneer, who was a middle man and independent of both parties, and a known man, should be allowed to measure between the buyer and seller, and be entrusted with the purchase money, [than that an unknown purchaser should be entrusted with the goods to measure them before paying their price.

(b) 1 B. & C. 1. The buyer of a parcel of wheat, by sample, has a right to inspect the whole in bulk at any proper and convenient time; and if the seller refuse to shew it, the buyer may rescind the contract. *Abbott, C. J.*—"It appears here, that, by the usage of the place, the buyer has a right to inspect the wheat in bulk; which is so reasonable, that, without such usage, the law would give him that right."

(c) 3 B. & Ald. 321. The defendant at a public market bought of the plaintiff 12 bushels of tares,

constituting part of a larger quantity in bulk, to remain in the vendor's possession till called for; and the vendor set the purchase apart for him:—Held, no acceptance. And per *Abbott, C. J.*—"It is clear that he had a right to make any objection at the time when they were tendered to him for acceptance. If the defendant in this case had gone to the plaintiff's granary to demand the tares, and, upon inspection, had discovered that they did not correspond with the sample, it is impossible to say that he might not have made the objection."

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Sittings in London in Trinity Term, 1842.

BEFORE MR. JUSTICE CRESSWELL.

SUTHERLAND v. M'LAUGHLIN.

June 5th.

ASSUMPSIT.—The declaration was for work and labour (not stating in what capacity), with a count upon an account stated. Plea, non assumpsit.

It was opened by *Shee*, Serjt., for the plaintiff, that the plaintiff was a surgeon, and that the present action was brought for a compensation for his services in attending the defendant, who had had his thigh dislocated in going to Epsom races, and for which he had recovered 600*l.* damages against Mr. Pryor, whose carriage had occasioned the injury (a).

It was proved by Mr. Souther that he had heard from the defendant that the plaintiff had attended him, and that the defendant had told him that the plaintiff's bill was 50*l.*, but that he thought it a great charge. This witness also stated, that the defendant had told him that he had recovered 600*l.* in the action he had brought against Mr. Pryor (b).

It was also proved by Mr. Child that he was present at the trial of the action brought by the present defendant against Mr. Pryor, and that on that trial the present plaintiff was examined as a witness on behalf of the then plaintiff, who was the present defendant.

(a) See the case of *M'Laughlin v. Pryor*, ante, p. 354.

(b) As to the production of the *nisi prius* record to let in evidence

of what occurred on a former trial, see the case of *Doe d. Lloyd v. Passingham*, 2 C. & P. 440.

The carriage of P. was driven against the carriage of M., whereby M.'s thigh was broken. On the trial of an action of trespass by M. against P. for this, S., a surgeon, was called as a witness for M., who recovered £600 damages against P. S. afterwards brought an action against M. for his services as a surgeon in attending M. after his thigh was broken. The counsel of S. proposed to go into evidence to shew what S. stated as to the amount of his charge for attendance on M. in giving his evidence on the trial of the action by M. against P.: —*Held*, that such evidence was not admissible.

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Petersdorff, for the plaintiff, proposed to ask Mr. Child what the present plaintiff said, on giving his evidence upon that trial, as to the amount of his charges for attendance on the present defendant in respect of the dislocation of his thigh.

Gaselee, Serjt., for the defendant.—I submit that what the present plaintiff said on that trial is not receivable in evidence on the present trial. A party is not bound by every thing that every one whom he calls as a witness may choose to say on a trial.

Shee, Serjt.—As the present plaintiff was called as a witness by the present defendant, it must be taken that what he said on that trial was said with the knowledge of the latter; and it is not simply that the present plaintiff was called as a witness by the present defendant, but the present defendant obtained the benefit of what the present plaintiff then stated by the verdict that was obtained against Mr. Pryor, and, further, it cannot be supposed that the present defendant called a witness to say what was untrue.

Gaselee, Serjt.—The argument on the other side is fallacious. It is argued that this evidence is admissible because the present defendant called the present plaintiff as a witness on the former trial, and therefore is bound by all he said in giving evidence when so called; but it should be observed, that when a party calls a witness he not only cannot tell what that witness will say, but he would not be allowed to discredit the evidence of that witness, even if the evidence was the very contrary of all that he expected.

CRESSWELL, J.—I think that a party cannot make evidence for himself by what he says in another cause. I think I ought not to receive the evidence.

The evidence was rejected.

Verdict for the plaintiff, damages 35*l.* (a).

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Shee, Serjt., and *Petersdorff*, for the plaintiff.

Gaselee, Serjt., for the defendant.

[Attornies—*Edge*, and *Oliver*.]

(a) See the cases of *Battersby v. Lawrence*, *antè*, p. 277, and *Little v. Oldaker*, *antè*, p. 370. .

COURT OF EXCHEQUER.

Sittings in London after Michaelmas Term, 1841.

BEFORE LORD ABINGER, C. B.

CATHERWOOD *v.* CASLON.

Dec. 11th.

ACTION for criminal conversation with the plaintiff's wife.—The writ bore date 11th December, 1840. Pleas, not guilty; and that the said Gertrude Catherwood was not at the time, &c. the wife of the plaintiff in manner and form, &c.

In an action for crim. con. the marriage was proved to have been solemnised at the office of the British consulate at Beyrout, but there was some doubt whether it

The plaintiff had been married to his wife at the office of

had been solemnized strictly according to the rites of the Church of England: it was not solemnised according to the custom of the country in which it took place. The parties lived as husband and wife for two years afterwards:—*Held*, that, for the purposes of the jury's verdict, this must be considered a marriage in fact.

The writ in an action for crim. con. was dated 11th December, 1840; there had been suspicious circumstances touching the conduct of the plaintiff's wife and of the defendant before that time, and they had both left this country about June, 1840. It was not shewn that they had left this country together. In August, 1841, the parties lived in open adultery in England. The judge directed the jury that they must dismiss from their minds every thing which might have occurred after the date of the writ, i. e. in and after August, 1841, and they must infer the adultery, or repudiate it, by what had happened before 11th December, 1840.

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the British consulate at Beyrout in Syria, in March, 1834, by a missionary clergyman of the United States, one, attached to what in those states was known as the Episcopalian sect,—the Church of England in this country,—and the marriage was celebrated according to the forms of the Church of England.

The plaintiff and his wife went to America in 1836, and she returned to England with her children in September, 1839. An intimacy arose between the plaintiff's wife and the defendant; and it was in evidence, that, on a particular occasion in June, 1840, the plaintiff's wife dined with the defendant and his father at the father's residence; that in the evening the plaintiff's wife and the defendant went out together; that the defendant came back about ten o'clock alone; that the plaintiff's wife came back also about two hours afterwards much agitated, and remained in the house all night. Immediately after this occurrence, both the defendant and the plaintiff's wife disappeared from England, and were never heard of in this country again till August, 1841, when they were seen walking together in London, and occupied the same room in the defendant's father's house.

Thesiger, to the jury.—The writ is dated 11th December, 1840, and the plaintiff must make out that the adultery was committed before that time. The evidence is, that on one occasion the plaintiff's wife slept at the house of the defendant's father in June, 1840, and that shortly after that time both the plaintiff's wife and the defendant disappeared from this country. This is no evidence that they eloped together, nor that they lived together. The fact of their being seen together again, and living together in August, 1841, cannot be considered, for that was after the issuing of the writ. The plaintiff is bound to make out that the circumstances which happened previous to December, 1840, are inconsistent with *any* other supposition than that of the adulterous intercourse of the parties.

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Lord ABINGER, C. B. (in summing up).—There are two questions here. *First*, whether this lady was really the plaintiff's wife. There may be a doubt whether the marriage were solemnized according to the rites of the Church of England, and whether the person officiating were a clergyman of that church; or whether, on the other hand, the marriage were lawful according to the laws of the country in which it took place. In the absence of all these various conditions, there was perhaps no valid marriage; yet, for the purpose of your verdict, the marriage must be considered as proved in fact. The next question is, as to the adultery, whether it has been proved to have occurred previously to 11th December, 1840? The circumstances which have been detailed as to the plaintiff's wife going out with the defendant at the defendant's father's house, may be looked at by you in connection with the subsequent disappearance of the two (though there is not any evidence that they eloped together); but when they came back in August, 1841, and lived together, the action had been already brought. What occurred after 11th December, 1840, cannot matter, and you should dismiss it from your minds.

Verdict—Guilty. Damages, £200.

Pollock, A. G., and *Barstow*, for plaintiff.

Thesiger and *Ogle*, for defendant.

[Attornies—*C. Hyde*, and *H. Evans*.]

Afterwards the Court was moved, on the ground that the marriage was invalid; but their Lordships suspended their judgment on that point till the cases of *Q. v. Carroll*, and *Q. v. Millis*, should be decided, which were at that time under the consideration of the House of Lords.

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Second Sitting at Westminster in Trinity Term, 1842.

BEFORE BARON PARKE.

June 5th. YARDLEY and Another v. ARNOLD the Younger, Executor of ARNOLD the Elder.

A person who is sued as an executor, and who pleads plene administravit, only admits thereby that he is executor de son tort; and an executor de son tort is not liable to the amount of all the property of the testator that would pass by a will, but only for the amount of assets that come to his hands.

DEBT against the defendant, as executor of his father, for five quarters' rent of premises demised by the plaintiffs to the defendant's father.

Pleas—first, except as to the sum of 2*l.* 19*s.* 6*d.*, plene administravit; second, as to the sum of 11*l.*, payment of it by the defendant's father in his lifetime; third, as to the sum of 2*l.* 19*s.* 6*d.*, payment of it into Court.

Replication to the first plea, that the defendant had not fully administered; to the second, a denial of the payment of 11*l.*; and to the third, an acceptance of the sum of 2*l.* 19*s.* 6*d.* in satisfaction of so much of the plaintiffs' demand.

A. was sued as executor of his father, and pleaded plene administravit. It appeared that the father left no will, and was the owner of a leasehold house, and that A., after his father's death, had received some small sums which had been due to his father, and had paid the expenses of his father's funeral:—*Held*, that A. was not liable for the value of the leasehold house, and was only liable to the extent of the sums he had actually received, against which he had a right to deduct reasonable funeral expenses.

The usual allowance for funeral expenses to be paid from an insolvent estate, is £20.

In an action against a person sued as executor of A., in which plene administravit is pleaded, and in which no evidence has been given as to how A. has disposed of his property, or even that he left any will, the widow of A. is not a competent witness for the defendant: and this is not a case in which the witness can be rendered competent by indorsing her name on the record under the stat. 3 & 4 Will. 4, c. 42, ss. 26, 27.

If a witness is sworn in chief, but has not been asked any question in his examination in chief, it is not too late to take an objection to his competency, on the ground of interest, and such an objection is not confined to examinations on the voir dire.

A., being sued as executor de son tort of his father, claimed certain goods under a deed of assignment from his father to himself, the consideration whereof was stated in the deed to be a debt due from his father to him, and to prove that the deed was not fraudulent, it was proposed by A.'s counsel to go into evidence to shew that A.'s father really owed A. money:—*Held*, that, for this purpose, what A.'s father said to A. or in A.'s presence, as to his owing A. money, was receivable in evidence, as it was proof of an account stated between them, but that what A.'s father said on the subject, in the absence of A., was not receivable in evidence, as that would be merely an admission by A.'s father under whom A. claimed, but under whom the plaintiff did not claim.

It appeared that Mr. Arnold, sen., who died on the 31st of October, 1841, was the lessee of the house No. 3, High-street, St. Giles's, which he held of the plaintiffs, and that he also was the lessee of the adjoining house, No. 2, which he did not hold of the plaintiffs, and in which he resided and carried on the business of a plane-maker.

It was proved, that after the death of his father the defendant received some small sums from several weekly tenants of his father who resided in the house, No. 2; but it also appeared that the defendant had paid for his father's funeral; and it was also proved, that in the month of November, 1841, Mr. Shoubridge, the plaintiffs' attorney, called on the defendant, who stated to him that his father, Mr. Arnold, sen., had owed him (the defendant) upwards of 600*l.*, and had assigned all his stock to him, which was worth about 400*l.*; and that his father had no other property, and died quite insolvent.

It was opened by *R. V. Richards*, for the defendant.—That the defendant had assisted his father in his business for several years, and had also lent his father money, and that the father, being unable to pay what was due to the son, had executed an assignment, whereby he conveyed his goods, and also the lease of the house, No. 3, High-street, to his son. He proposed to put in the assignment, and also to prove the consideration for it, by going into evidence to shew that the father was really indebted to the son, not only for services but for money lent also.

For the defence Mr. Gregg was called: and it was proposed to ask him what he had heard Mr. Arnold, sen., say, as to whether he owed money to his son, the defendant.

PARKE, B.—What the father said to the witness in the absence of the son is not evidence; but what the father said to the son, or in the presence of the son, would be so, as it would be evidence of an account stated between them,

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and so constitute a debt in like manner, as giving a bond or a bill of exchange.

Fortescue.—Does not your Lordship think that what the father said in the absence of the defendant is an admission of a debt by the father?

PARKE, B.—It is an admission by the person under whom you claim, but not under whom the plaintiffs claim.

The question was restricted to statements of the defendant's father, made to the defendant or in his presence.

An assignment, which was by deed dated September 16, 1841, and executed by Mr. Arnold, sen., and the defendant, was put in. It recited, that John Arnold the elder was indebted to John Arnold the younger "in the sum of £490; £200, part thereof, being money lent and advanced by the said John Arnold the younger to the said John Arnold the elder; and the residue of the said sum of £490 being interest on the said sum of £200, at the rate of five per centum per annum, and salary due and owing to the said John Arnold the younger, as foreman and manager of the business of the said John Arnold the elder:" and that John Arnold the elder, being unable to pay or satisfy the same, had proposed "to make an absolute assignment of his stock in trade, household goods, wares, and merchandize (save and except the wearing apparel and linen of himself and his wife), and the lease of the house No. 2, in High-street, St. Giles's." And the said John Arnold the elder, by this deed, in consideration of the sum of £490, so due and owing as aforesaid, assigned his stock in trade, goods, merchandize, and effects, and the lease of the house No. 2, to John Arnold the younger, absolutely, the deed not containing any power of redemption.

Evidence was given of the payment of a bill of exchange for £100, indorsed by the defendant to his father in the year 1823, the amount of which was proved to have been paid to the defendant's father.

Mrs. Arnold, the widow of Mr. Arnold, sen., was called for the defendant: she was sworn in chief (and not on the voir dire), and stated, in answer to a question, that she was the widow of Mr. Arnold, sen.

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Dundas, for plaintiffs, objected that this witness was incompetent, on the ground of interest.

PARKE, B.—She comes to prevent the assets from being charged, in this action, with the amount of the rent; and also comes to prevent the assets from being charged with the costs of this action.

R. V. Richards applied to have the name of Mrs. Arnold indorsed on the record, under the stat. 3 & 4 Will. 4, c. 42, sects. 26, 27 (a).

PARKE, B.—I think that this is not a case within that statute. The verdict in this case could not be evidence either for or against her. She comes to prevent a charge on the property in which, for all that appears, she is interested to the extent of one-third of the residue.

R. V. Richards.—The witness has been sworn to give evidence in the cause, and I submit that this objection to her competency comes too late.

Dundas.—It is certainly too late to rely upon that after the objection has been argued.

PARKE, B.—I will ask the other Barons whether this objection can be taken after the witness has been sworn in chief.

After having conferred with the other learned Barons, his Lordship added, "I shall reject the witness, although I

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think that, in some respects, it would be a wise rule that the examination as to the competency of a witness should be upon the voir dire, and not afterwards, and that the cross-examination should go to his credit; for if a witness's evidence can be rejected upon what is elicited in cross-examination, the party may take the chance of what the witness's evidence is, and then reject him upon something that occurs in the cross-examination, if he does not like the evidence the witness has given.

The witness was not examined (*b*).

Evidence was given that £11 had been paid by Mr. Arnold, sen., in his lifetime; and that the burial fees, paid by the defendant for the funeral of Mr. Arnold, sen., were 2*l.* 2*s.*

PARKER, B.—The defendant has a right to deduct reasonable funeral expenses: £20 is the sum allowed now on an insolvent estate. Is the defendant only executor de son tort, by having received some rents, or is he really the executor of his father?

DUNDAS.—On this record he admits himself executor; and I submit that he is liable for the value of the deceased's leaseholds, even if the assignment could be supported.

PARKER, B.—The defendant has admitted, on this record, that he is executor, but that may be only that he is executor de son tort. An executor de son tort is not liable to the amount of all the property of the testator that would pass by a will, he is only liable for the amount of assets which came to his hands.

Mrs. Gregg, one of the witnesses for the defence (being recalled by the learned Baron), stated, that she was in the

(*b*) As to the proper time for challenging jurors, see the case of *R. v. Frost*, 9 C. & P. 137.

house of Mr. Arnold, sen., when he died, and that search was made for a will, but none could be found.

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PARKE, B. (in summing up).—It now appears that the defendant is an executor of his own wrong, and he is therefore only responsible for the assets that he has actually received. With respect to the small sums received by him as rents, he appears to have discharged himself by paying the funeral expenses, and by the sum of 2*l.* 19*s.* 6*d.* paid into Court. The real question, therefore, is, whether the testator's stock in trade, &c., which are stated to be worth £400, passed to the defendant under the assignment, or whether that assignment is fraudulent, and the value of that property is assets of the deceased in the hands of the defendant. If the assignment be valid, the defendant is entitled to a verdict; and if the assignment is fraudulent, the verdict should be for the plaintiffs.

Verdict for the plaintiffs on the first issue—
and for the defendant on the second, as to
the payment of £11.

Dundas and Ogle, for the plaintiffs.

R. V. Richards and Fortescue, for the defendant.

[Attornies—*Shoubridge*, and *Bridges & Mason*.]

On a subsequent day, *R. V. Richards* applied for a new trial, on the ground that Mrs. Arnold was a competent witness, and that, even if she were not, the objection to her competency was made too late; but the Court refused a rule (c).

(c) In moving for a new trial in this case, *R. V. Richards* cited the case of *Nowell v. Davies*, 5 B. & Ad. 368, in which it was held, that an unpaid legatee is not disqualified by interest from giving evidence for the defendant in an action against

the executor for a debt; but Lord Abinger, C. B., said, "As to the case of *Nowell v. Davies*, the opinion of the majority of the judges of this Court is, that it was a wrong decision." 11 Law J., New Ser., Exch. 413.

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Sittings in London in Trinity Term, 1842.

BEFORE BARON ALDERSON.

June 7th.

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By a charter-party, "fifteen days" were to be allowed to the freighter of a ship, "for discharging at her destined port." The freighter ordered the ship to Hull. She was got into the Hull Docks on the 1st of February, and was on that day put in the charge of the dock company's officers, but from the crowded state of the docks she was not put in her berth, and did not begin discharging till the 4th:—

ASSUMPSIT.—The declaration stated, that, on the 30th of April, 1841, by a certain charter-party then made, it was agreed by the plaintiff, therein described as the owner of the ship *Trinidad*, and the defendant, that the ship should proceed to Honduras and there load, "*at one of the usual and customary ports or places of loading, including the rivers Ulna and Dulce*, a full and complete cargo of mahogany, with logwood or log-ends for broken stowage only, and proceed to a good and safe port of discharge in the United Kingdom." "Twenty-five running days for every hundred tons of mahogany were to be allowed the said merchant, if the ship were not sooner dispatched, for loading the said ship at Honduras, and fifteen days for discharging at her destined port in the United Kingdom, and thirty days on demurrage over and above the said loading days, at £6 per day." The declaration then went on to aver, that the

Held, that the fifteen days were to be computed from the 1st.

In such cases the days count from the time of the vessel's arriving in the dock, and being put in the management of the dock company's officers.

In reckoning the "fifteen days," the days are to be reckoned consecutively, and the Sundays not deducted, unless there be a custom to that effect; and in the absence of any custom, the word "days," and the words "running days," mean consecutive days.

The general rule of law is, that days mean consecutive days, except Sunday is the first or the last day; but in commercial cases it is sometimes otherwise, because mercantile contracts are to be construed with reference to mercantile usage.

By a charter-party a ship was to proceed to Honduras and there load, "*at one of the usual and customary ports or places of loading, including the rivers Ulna and Dulce*," a cargo of mahogany and logwood. The freighter by letter directed the captain to proceed to Belize in the bay of Honduras, and address himself to Mr. S., "who will furnish you with a homeward cargo of mahogany and logwood, agreeable to charter-party." The captain took the ship to Belize, where Mr. S. put a small quantity of logwood on board and directed the ship to go to Ulna, where about half a cargo was put on board. Mr. S. then sent the ship to two other places of loading in Honduras, at which the cargo was completed:—*Held*, that it was a question for the jury whether the ship was sent to Belize as her port of loading; and that if she was, the freighter was liable for the extra expenses of her going to all the other places for the residue of her cargo; but that, if Belize was not to be considered her port of loading, Ulna certainly was, and the freighter would at all events be liable for the extra expense of her going for cargo to other places after Ulna, as by the charter-party the freighter was to load at *one of the usual ports or places of loading in Honduras*.

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ship sailed to Honduras and arrived there, being consigned to one Joseph Swasey, the agent of the defendant, and at one of the usual and customary ports and places there, to wit, Belize, was ready to load. Breach, that the defendant did not nor would load on board the ship a full and complete cargo at one of the usual and customary ports and places of loading, including the rivers Ulna and Dulce, but, on the contrary, in order to obtain such cargo, the plaintiff was forced and obliged, and the defendant's agent required him, to go from Belize to another port in Honduras, to wit, to Amoa, and from thence to another place of loading in Honduras, to wit, to Ulna, and from thence back again to Amoa, and from thence to another place of loading in Honduras, to wit, Monkey River, and from thence back again to Belize aforesaid; by reason of which the plaintiff was obliged to expend divers sums of money. There was also an averment that the ship brought a full cargo of mahogany to Hull, the plaintiff having orders from the defendant to proceed thither, and there delivered the cargo; and that the defendant did not nor would discharge the said cargo at Hull within the said number of fifteen days in the said charter-party in that behalf mentioned, but detained the ship for six days after the said fifteen laying days—whereby a sum of 1327*l.* 7*s.* 2*d.* became due to the plaintiff for freight, and £36 for demurrage; and although part of the sum due for freight, to wit, 1312*l.* 9*s.* 6*d.* had been paid, yet the defendant refused to pay the residue of the said freight, and would not pay any part of the said sum so due for demurrage as aforesaid.

Pleas—first, non assumpsit. Second, “as to the said supposed breach of promise in the said declaration first above assigned,” that the defendant did load a full and complete cargo, according to the charter-party, at one of the usual and customary ports or places of loading, including the rivers Ulna and Dulce, according to the form and effect of the said charter-party (concluding to the country). Third, as to the residue of the declaration, that the plaintiff

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did not deliver the said cargo, or any part thereof, to the defendant as in the declaration is alleged (concluding to the country). Fourth, as to so much of the declaration as relates to the non-payment of the residue of freight, that the defendant had paid it. Fifth, as to so much of the declaration as relates to the non-payment of the residue of the freight, that, by the neglect and default of the plaintiff's servants, a portion of the cargo was damaged, and that it was agreed between the plaintiff and the defendant that the defendant should abandon all claim for the damage, and the plaintiff abandon all claim for the residue of the freight (concluding with a verification). Sixth, "as to so much of the said declaration as relates to the said supposed demurrage in the said declaration mentioned," that the defendant did not detain the ship over and above the said fifteen laying days in the charter-party mentioned (concluding to the country). Seventh, as to the supposed demurrage, that the defendant would have discharged the cargo within the number of fifteen days in the charter-party mentioned, but was prevented so doing by the wrongful act, procurement, neglect, and default of the plaintiff, his servants and agents (concluding to the country).

Replication to the first, second, third, and sixth pleas, a similitur; to the fourth plea, a denial of the payment; to the fifth plea, a denial of the agreement in that plea mentioned; and to the last plea, *de injuriâ*.

The charter-party was put in. It was dated the 30th of April, 1840; and by it the ship *Trinidad* was to proceed to Honduras, "and there load from the factory of the said merchant, say at *one of the usual and customary ports and places of loading, including the rivers Uma and Dulce*, a full and complete cargo of mahogany, with log-wood or log-ends for broken stowage only;" "and, being so loaded, shall therewith proceed to a good and safe port of discharge in the United Kingdom," "and there deliver," upon being paid freight for mahogany at the rate of

3*l*. 17*s*. 6*d*. per ton, and for logwood or log-ends £1 per ton. "Twenty-five running days for every 100 tons of mahogany are to be allowed to the said merchant, if the ship is not sooner dispatched, for loading the said ship at Honduras, *and fifteen days for discharging* at her destined port in the United Kingdom, and thirty days on demurrage over and above the said laying days, at £6 per day."

A letter of instructions from the defendant to Captain Huntley Brown, the captain of the *Trinidad*, dated May 30th, 1841, was put in, of which the following is an extract: "Sir,—Having chartered your vessel for a return cargo from Honduras to a port in the United Kingdom, you will now be pleased to proceed and make the best of your way for Belize, in the bay of Honduras. On your arrival there, you will address yourself and vessel to my friend Mr. Joseph Swasey, who will furnish you with a homeward cargo of mahogany and logwood, agreeably to charter-party; which being completed, you will then proceed homeward, calling at Cork for orders, at which port the necessary timely instructions as to your port of destination will be awaiting your arrival," &c.

It was proved by Captain Huntley Brown, that in consequence of this letter he proceeded with the ship to Belize, and arrived there on the 17th of September, 1840, when he reported himself to Mr. Swasey, who, after putting about twenty tons of logwood on board the ship, directed him to proceed to Amoa, which he objected to do; but, after objecting, went thither because he was not able to get cash to carry on the ship without doing so, unless he had executed a bottomry bond. It was further proved by Captain Huntley Brown, that he, by the direction of Mr. Swasey's agent, proceeded to Ulna, where about half a cargo of mahogany was put on board, and thence to Amoa again, and thence to Monkey River, where about one-third of a cargo was put on board, and thence to Belize again, where the residue of the cargo being obtained from Mr. Swasey, the ship sailed for England on the 25th of

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November, 1840, and arrived at Hull (the port directed by the defendant) on the 1st of February, 1841, and was reported on that day, and got into the Hull docks, and was put in the charge of the dock company's officers on that afternoon. This witness stated, that the extra expense of going to the different places at Honduras amounted to £157.

It was proved by Mr. Brown, that the discharging of the cargo commenced on the 4th of February, and was completed on the 23rd, the ship not having been got to the dock side till the 4th, by reason of the crowded state of the docks.

The entry in the books of the custom-house at Hull was put in, which shewed that the ship was reported on the 1st of February.

S. Martin addressed the jury on the facts of the case, and opened evidence on the fifth plea; and with respect to the demurrage, he submitted that the fifteen days were to be computed from the time the ship was put in a condition to deliver her cargo, and that it was contrary to good sense that the time should begin before the ship was able to unload, and therefore that the time ought in this case to be calculated from the 4th of February, and the Sundays, which were the 7th, 14th, and 21st of February, be excluded.

ALDERSON, B.—The general rule of law is, that "days" mean consecutive days, except Sunday is the first or the last day; but in mercantile cases it is sometimes otherwise, because mercantile contracts are to be construed with reference to mercantile usage (*a*).

(*a*) Lord *Tenterden* lays down (Abb. on Shipping, tit. Demurrage), that "the word 'days,' used alone in a clause of demurrage for unloading in the river

Thames, is said to be understood of working days only, and not to comprehend Sundays or holidays, by the usage among the merchants in London; but it is much better to

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Evidence was given with a view of proving the fifth plea, but on this part of the case no question of law arose; and evidence was also given that the cargo was discharged

mention working or running days expressly, according to the intention of the parties."

In the case of *Cochran v. Retberg*, 3 Esp. 121, which was an action for demurrage, the voyage being from the Elbe to London, the memorandum on the margin of the bill of lading was—"To be discharged in 14 days, or pay five guineas per day demurrage." The ship arrived in the Thames, and was reported on the 9th of December, and was not cleared till the 30th. The plaintiff contended that the 14 days were running days, expiring on the 24th, and he therefore claimed for six days' demurrage. The defendant contended, that the word "days" generally meant working days, and did not include Sundays or Custom-house holidays, and claimed to deduct for St. Thomas's-day, Christmas-day, and the three following days, as days on which no goods could be landed at the Custom-house; but it was proved that on these days goods could be taken out of the ship into lighters. Several witnesses were examined as to the usage whether the word "days" in the margin of the bill of lading meant running days or working days, but their evidence was contradictory; but Lord *Eldon*, C. J., said—"If no evidence had been offered, but I was to decide on the clause itself, I should have been of opinion that it meant running days; if that was so—if evidence of usage was not admissible, and the parties had made such a contract, they

must abide by it, even though they could not perform it, as if the vessel had arrived on a holiday and there had been holidays on the 14 subsequent days. As the law, however, stands, usage may be admitted to establish the meaning of the words used in the margin of the bill of lading, whether the word 'days' used in it means running days or working days. If this was the case of inland trade, this must mean working days, as the law of the country prohibits working on such days as those which formed part of the 14 days claimed by the plaintiff to be allowed by the bill of lading in this case; but as the question now stands, it is a matter of general importance to have the opinion of a special jury of the city of London on the usage of trade with respect to instruments of this description." "The question, therefore, resolves itself into a question of usage; if it is left to the construction of law, I should be of opinion that the plaintiff ought to succeed; if the fact of the usage is clearly made out that the 14 days mentioned in the bill of lading mean working days, that is a construction which excludes Sundays and holidays at the Custom-house, and there must be a verdict for the defendant." The jury found for the defendant.

As to when a plaintiff cannot recover on a common count for demurrage, but must declare specially, see the case of *Horn v. Bensusan*, 9 C. & P. 709.

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by a lump sum, and that there was no unnecessary delay (*b*).

Whateley, in reply.—I submit that the plaintiff is entitled to demurrage from the time the ship was reported to be ready for discharging till the last day when the last portion of her cargo was taken out, and that in computing the time the Sundays should be reckoned (*c*).

(*b*) In the case of *Levy v. Yates*, 3 Taunt. 385, where a general ship had taken brandies on board under bills of lading which allowed 20 lay days for delivery of the goods in London, and stipulated for £4 per day demurrage afterwards, certain of the consignees, choosing to have their goods bonded, the vessel could not make her delivery at the London Docks until 46 days after the 20 days, and some of the goods which were undermost could not, though demanded, be taken out till the upper tiers were cleared. It was held, that each of the consignees was liable on a general count for demurrage to pay the £4 per day for the 46 days.

In the case of *Harman v. Gaudolph*, Holt, N. P. C. 35, a general ship had taken silk on board to carry from Rotterdam to London, on the defendant's account. On the margin of the bill of lading was written—"The consignee to clear the goods in 14 running days after her arrival in port, or to pay £4 per diem for demurrage." The vessel was ready to deliver on the 3rd of October, and the *defendant applied for and was ready to receive his goods within the running days*, but, being undermost in the vessel, delivery could not be made till the 22nd. It was held, that the plaintiff was entitled to recover de-

murrage, though he did not deliver the goods within the time allowed, being prevented by other goods belonging to other consignees which overlaid them: and *Gibbs, C. J.*, said—"Each consignee undertakes to clear away his goods within a certain time, and although by the *default of others* he is prevented from so doing, he is liable notwithstanding to demurrage by the terms of the contract, *unless the delay be occasioned by the default of the captain or his crew.*" "In point of law, I think, the plaintiff is entitled to recover, though he did not deliver the goods, being prevented by other goods belonging to other consignees, which overlaid them." In the case of *Barrett v. Dutton*, 4 Camp. 333, where there was a stipulation in a charterparty that thirty running days should be allowed for loading the ship, it was held that the freighter was liable for her subsequent detention for that purpose, although the loading of her within the specified time was rendered impossible by the ice in the river where she lay; but that after her loading was completed, the freighter was not liable for any delay that might arise in despatching her occasioned by the accidental impossibility of obtaining her clearances.

(*c*) In the case of *Brereton v.*

ALDERSON, B., (in summing up).—The second plea states, that the defendant did load in and on board this ship a full cargo according to this charterparty at *one* of the usual and customary ports or places of loading, including the rivers Ulna and Dulce; and to shew that he did not a letter is put in, by which he directs the ship to go to Belize, where a part of the cargo is put on board. The letter does not in terms direct him to Belize for his cargo. It is for you to say, whatever ambiguity there may be in the letter, whether the conduct of the parties does not fix Belize as the port of loading. It is not material to the verdict whether Belize was the port of loading or not, because if Belize was not, Ulna certainly was; and at all events the defendant cannot say that he put a full cargo on board at any *one* port, which he was bound to do. Still it is important with respect to the damages; for, if Belize was not the port to which the ship was directed as the port of loading and Ulna was, the plaintiff cannot charge anything for additional expenses in going to Ulna. With respect to the claim for demurrage, it appears that the ship arrived at Hull on the 1st of February, and on that day was reported, and was also put in the charge of the dock company's officers, and that she got to her berth on the 4th. Now the period from which the days count is from the time the vessel arrives in the dock and is in the management of the dock company's or harbour-master's officers, and, when neither party is to blame, the number of days run from the time when the ship is in a dischargeable state, and if no period is mentioned the cargo is to be discharged in a reasonable time, to commence from the time when the ship is in a state to begin delivering, therefore I

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Chapman, 5 M. & P. 526, it was held that the lay days, allowed by a charterparty for discharging a cargo, are to be reckoned from the time of the ship's arrival at the usual place of discharge, and not at the entrance of the port to which

she is chartered, and this, although part of the cargo was taken out for the purpose of lightening the vessel after she had entered the port, and before her arrival at the quay, which, by the custom of the port, was the usual place of delivery.

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think that demurrage should be calculated from the 1st of February, unless it were shewn that the lapse of time arose from the plaintiff's own negligence; and if it did you ought, as to this part of the case, to find for the defendant.

Verdict for the plaintiff on all the issues, with 151*l.* damages on the first issue; the jury also giving damages for three days' demurrage, and stating that they did not deduct the Sundays.

Whateley and H. Hill, for the plaintiff.

Jervis and S. Martin, for the defendant.

[Attornies—*Hewitt & Trollope*, and *W. Jones & Blaxland*.]

On a subsequent day, *Jervis* applied for a new trial, but the Court refused a rule; and Lord *Abinger*, C. B., said—"My opinion is, that the lay days under this charterparty commenced from the time the vessel entered the dock, as she had then arrived at the usual place of discharge. They certainly did not commence at the time of her entering the port, as that might be very extensive; for instance, Gravesend is part of the port of London: and with respect to the days, I think 'days' and 'running days' mean the same thing, namely, consecutive days, unless there be some particular custom. If you wish to exclude any days from the computation they must be expressed."

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Sittings at Westminster after Trinity Term, 1842.

BEFORE LORD ABINGER, C. B.

MARY TURNER, HENRY TURNER, and LAYTON v.
HARDEY.

June 17th.

ASSUMPSIT for use and occupation. Pleas—first, non assumpsit; and second, that the plaintiffs were, by this action, claiming to recover the amount of a quarter's rent due from the 25th of March to Midsummer day, 1841, by virtue of a certain memorandum of agreement made between the plaintiffs, executrix and executors of H. H. Turner, deceased, of the one part, and the defendant of the other part, whereby the plaintiffs agreed to let to the defendant, and the defendant agreed to take of the plaintiffs, executrix and executors as aforesaid, the premises in the declaration mentioned: that it was afterwards, to wit, on &c., agreed by and between the plaintiffs, the defendant, and one W. Wasbrough, that W. Wasbrough should hold and occupy the premises, as tenant thereof to the plaintiffs, from the 25th of March, 1841, and that the defendant should be discharged from all liability to pay any rent accruing subsequently to that time. The plea then averred, that the defendant on that day delivered up possession of the premises to W. Wasbrough, who held and occupied them till the Midsummer day following, on the terms of the said agreement; and that the plaintiffs accepted W. Wasbrough as their tenant, and in discharge of the liability of the defendant to the said rent (concluding with a verification). Replication to the second plea, de injuriâ.

If plaintiffs put in one part of a written agreement which is signed by the defendant only, and is duly stamped, the defendant may put the other part of the agreement, which is signed by one of the plaintiffs "for self and the other executors" although that part of the agreement is not stamped.

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On the part of the plaintiffs a written agreement was put in, by which the plaintiffs (therein described as executrix and executors of Mr. H. H. Turner, deceased) demised the premises in question to the defendant for a certain term. This agreement was signed by the defendant only, and was properly stamped.

The defence was, that the plaintiffs had agreed with the defendant to accept a person named Wasbrough as their tenant instead of the defendant, and that Wasbrough had taken possession accordingly; but the agreement to accept Mr. Wasbrough as tenant was by parol, and was made by Mr. Henry Turner (one of the plaintiffs) alone; and in order to shew that he had authority to act for the other two plaintiffs, in matters relating to these premises, *Crowder*, for the defendant, proposed to put in the other part of the agreement, entered into between the plaintiffs and defendant, the one part of which had been already given in evidence on behalf of the plaintiffs. This part of the agreement was signed by the plaintiff, Mr. Henry Turner, "For self and the other executors," but was not stamped.

Dundas, for the plaintiffs.—I submit that this document is not receivable in evidence, as it is not stamped.

Lord ABINGER, C. B.—I think that this part of the agreement is admissible without a stamp. The defendant proposes to make use of it for the purpose of proving agency, and the plaintiffs having put in the part of the agreement which is signed by the defendant alone, the defendant has a right to make use of the other part to shew the entire contract. I think the point does not admit of a question.

The evidence was received.

Verdict for the plaintiffs (a).

Dundas and Ogle, for the plaintiffs.

Crowder and Hurlestone, for the defendant.

[Attornies—*Turner*, and *Triston & Hardey*.]

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(a) This was a second trial of the case of *Turner and others v. Hardey*, 9 Mee. & W. 770. On the first trial, the defendant merely proved, in support of the second plea, that one of the plaintiffs (Mr. H. Turner) agreed by parol to accept Mr. Wasbrough as tenant, instead of the defendant, and on

that evidence alone the defendant had a verdict on the second issue; but the Court of Exchequer granted a new trial on the ground that the second plea was not proved by evidence that *one* of the plaintiffs had so agreed to accept Mr. Wasbrough as tenant, instead of the defendant.

Second Sittings at Westminster in Michaelmas Term, 1842.

BEFORE BARON ALDERSON.

LEAF v. BUTT.

Nov. 10th.

DEBT for goods sold, with a count upon an account stated. Plea—*nunquam indebitatus*.

The cause was undefended; and it was opened by *Humfrey*, for the plaintiff, that a letter had been sent by the plaintiff to the defendant, asking payment of the balance due, and that after receiving this letter the defendant had made an admission.

In order to give secondary evidence of this letter of the plaintiff, it was proved that a notice to produce it had been served on the defendant's attorney, at his office, in Craven-street, Strand, at seven o'clock, on the 9th of November, which was the evening before the trial. It was proved that the defendant lived in the Edgeware Road.

In a town cause for goods sold, in which the defendant and his attorney both lived in town, a notice to produce a letter from the plaintiff to the defendant, asking payment, was served at the office of the defendant's attorney, at 7 P. M., on the evening of the day before that on which the cause was tried:—*Held* to be not too

late, and the letter not being produced, secondary evidence was given of its contents.

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ALDERSON, B.—This is very late to send a notice to produce, but I will confer with the other members of the court upon the point.

His Lordship having conferred with the other learned Barons who were sitting in Banco, said, that he should receive the evidence.

Secondary evidence was given of the letter written by the plaintiff to the defendant.

Verdict for the plaintiff.

Humfrey, for the plaintiff.

[Attornies—*H. Lloyd*, and *W. H. Davis*.]

Nov. 11th.

MEYRICK v. WOODS.

In a town cause for an assault in which the defendant and his attorney both lived in town, a notice to produce a letter from the plaintiff's attorney to the defendant, asking compensation, was served at the defendant's house and at the office of the defendant's attorney, at about half-past six P.M., on the evening of the day before that on which the cause was tried:—*Held*, to be not too late, and the letter not being produced, secondary evidence was given of its contents.

THIS was an action for an assault. Plea—not guilty.

It was proved that at half-past six, on the evening of the 18th of November, (the evening before the trial), the plaintiff's attorney had caused a notice to produce a letter, written by him to the defendant asking compensation, to be served on the defendant at his house in Duke-street, Manchester-square, by leaving it with the defendant's wife, and that he had also caused a similar notice to be served at the office of the defendant's attorney, in Seymour-street, Bryanstone-square, at a few minutes later on the same evening.

ALDERSON, B., held that the service of the notice to produce was not too late, and allowed a copy of the letter to be given in evidence.

Verdict for the Plaintiff.

E. James and *Lush*, for the plaintiff.

C. Chadwicke Jones, for the defendant.

[Attornies—*Palmer* and *Maitland*.]

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LEVY v. PYNE and RICHARDS.

ASSUMPSIT.—The first count of the declaration stated, that Alfred Count D'Orsay, on the 20th day of March, 1842, made his promissory note, and thereby promised to pay, to his own order, 489*l.* 15*s.* for value received, three months after the date thereof, which promissory note he indorsed to the defendants, who indorsed it to the plaintiff. Second count, for money lent. Third count, upon an account stated.

Pleas, by the defendant Richards—first, to the first count, that he did not indorse the note; and secondly, to the second and third counts, non assumpsit.

The defendant Pyne suffered judgment to go by default.

It was opened by *Platt* for the plaintiff, that the defendants had been for some years in partnership as attornies and solicitors, and had been also extensively employed as money scriveners by various gentlemen of fashion at the west end of the town, to raise money for those gentlemen on the discount of their bills and notes, which made it necessary for the defendants, in the course of their business, to indorse a considerable number of such bills and notes, for the purpose of their being discounted. He would show that it had been the constant habit for each of the defendants to draw and indorse bills in the name of the firm, and it would also be shown that the note in question was indorsed by Mr. Pyne in the partnership name, to satisfy a joint judgment against both the defend-

If a bill of exchange or promissory note be drawn, accepted, or indorsed, by one of two persons who are partners in a business which is not a trade (e. g. as attornies) in the name of the firm, and the partner, who did not write the names of the firm, by his plea deny the drawing, acceptance, or indorsement respectively, the plaintiff must give evidence of the authority of the other partner to draw, accept, or indorse in the name of the firm; but in the case of a commercial firm this is not necessary, as there is a general authority.

P. and R., who were in partnership as attornies, were sued as the indorsers of a promissory note indorsed by P. in the name of the

firm. P. suffered judgment by default, and R. pleaded that he did not indorse :—*Held*, that in order to show an authority in P. to indorse notes in the name of the firm, parol evidence could not be given of other bills and notes drawn, accepted, or indorsed in a similar manner and paid by the firm, as showing a course of dealing; but that each bill and note must be produced or accounted for; and that such of the bills or notes as had been given up to the defendants when paid, might be called for under a notice to produce, and, if not produced, secondary evidence might be given of their contents.

Held also, that evidence might be given of bills and notes (which were produced) which had been drawn, accepted, or indorsed by R. in the name of the firm, and which were afterwards paid by the firm, as this was evidence of a mutual authority for each partner to draw, accept, and indorse notes and bills in the name of the firm.

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ants, and that Mr. Richards, after the note was so indorsed, expressed his approbation of what had been done.

It was proved by Mr. Daniels, that the defendants were in partnership as attornies and solicitors, and were also extensively employed as money scriveners in raising money for various clients by the discount of bills and notes, and that he had discounted a bill for £62, drawn by Messrs. Pyne and Richards upon a person named Shirley, which bill was drawn in the name of the firm of Pyne and Richards, but in the handwriting of Mr. Richards, who also indorsed it in the name of the firm. (This bill was produced.)

ALDERSON, B.—In this case, which is not one relating to a commercial firm, it must be shewn, on the part of the plaintiff, that Mr. Pyne had authority to indorse in the name of the firm. In the case of a commercial firm there is a general authority (a).

It was further stated by Mr. Daniels, that he had dis-

(a) In the case of *Hedley v. Bainbridge*, 2 G. & D. 483, it was held that one partner of a firm of attornies has no authority to make a promissory note in the name of the firm, though for money delivered to him in the course of business, to be invested by the firm on mortgage; and in delivering the judgment of the Court of Queen's Bench in that case, Lord Denman, C. J., said, "The defendant and a Mr. Spurrier were in partnership as attornies; a sum of money was deposited with Mr. Spurrier by the plaintiff, a client of the firm, to be laid out on mortgage, and he gave the plaintiff the promissory note of the firm for the amount. The question is, whether, under those circumstances, Spurrier had power to bind the firm by such note. No

doubt a debt was due from the firm, but it does not follow that one partner had authority to give a promissory note for that debt. Partners *in trade* have authority, as regards third persons, to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do, and this authority is by the custom of merchants, which is part of the general law of the land, but the same reason does not apply to other partnerships. There is no custom or usage that attornies should be parties to negotiable instruments, nor is it necessary for the purposes of their business. Upon the whole we think that the implied authority is confined to partners in trade."

counted ten or a dozen bills for Messrs. Pyne and Richards, to the amount of £2000 or £3000.

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Platt.—Does not your Lordship think I may ask this witness what was the course of dealing between him and the defendants, as to the accepting and indorsing of bills?

ALDERSON, B.—I think not. The way in which the bills were drawn and indorsed, and in whose handwriting, would appear by the production of the bills.

Mr. Morris Levy, a son of the plaintiff, produced a bill which was drawn in the name of "Pyne and Richards," which was brought to him by Mr. Richards, and of which the drawing and indorsement was in Mr. Richards's handwriting.

Kelly, for the defendant Richards.—I submit that the plaintiff cannot go into evidence as to any other bills; and that the evidence of a practice is not receivable. It would not follow, that, because one of these gentlemen had given the other authority in one, or even in one hundred instances, to indorse a particular bill or note, or particular bills or notes, that he therefore gave authority for the indorsing of this note.

ALDERSON, B.—The question is, whether evidence of a number of bills given in this way, and afterwards paid, would not go to show a general authority.

Kelly.—Mr. Pyne having given Mr. Richards a general authority, or any number of particular authorities, to indorse bills or notes in the name of the firm, would be no evidence that Mr. Richards had given Mr. Pyne any authority at all.

ALDERSON, B.—I cannot say that it might not be evidence of mutual authority.

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Mr. Morris Levy further said, "I had a bill drawn in the name of 'Pyne and Richards,' in the handwriting of Mr. Pyne. It was drawn on a person named Shirley. Mr. Richards asked me to renew it, and gave me the note I have produced, which is signed in the name of 'Pyne and Richards' by Mr. Richards. I gave up the bill to Mr. Richards. I have often discounted bills for Messrs. Pyne and Richards at their own office, when both have been present."

A notice to produce was put in, and by it the plaintiff's attorney gave the defendants and their attorney notice to produce "all bills of exchange drawn by the said defendants on Count D'Orsay, and all promissory notes drawn by Count D'Orsay and indorsed by the defendants, and all bills of exchange drawn by the defendants on — Shirley, and all promissory notes made by — Shirley and indorsed by the defendants."

Mr. Morris Levy.—"The promissory note that I have produced was given to me as a renewal of a bill of the same parties, which I gave up to Mr. Richards."

Platt called for that bill under the notice to produce, but it was not produced.

Mr. Morris Levy.—"The bill which I gave up was indorsed in the handwriting of Mr. Pyne, with the name of 'Pyne and Richards.'"

Mr. Lewis, the plaintiff's attorney, produced an examined copy of a judgment against the present defendants, at the suit of the present plaintiff, and stated that that judgment had been obtained against the present defendants, and a similar judgment against Count D'Orsay, upon a bill of exchange, accepted by the latter and drawn by the former; and that all three having applied for time, he had agreed to take the note on which the present action

was brought in lieu of the judgment; and that Mr. Pyne, having indorsed the note in the name of the firm of Mr. Richards, called on the following day to ask further time, when he (Mr. Lewis) said, that the matter was settled, and shewed Mr. Richards the note which Mr. Pyne had indorsed; upon which Mr. Richards said it was all right.

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ALDERSON, B., inquired of the defendants' counsel if they had any answer to this case, and, on their replying in the negative, his Lordship directed the jury to find for the plaintiff.

Verdict for the plaintiff.

Platt, Humfrey, and Gunning, for the plaintiff.

Kelly, Petersdorff, and Prideaux, for the defendants.

[Attornies—*C. Lewis*, and *I. Davis*.]

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Sittings in London in Michaelmas Term, 1842.

BEFORE BARON ALDERSON.

Nov. 17th. GIBSON and Others, Assignees of EMILY ANN BIRCH, a Bankrupt, v. KING.

A boarding and lodging-house keeper, who also keeps a stock of wine, which she supplies to her boarders and lodgers, by a bottle at a time, as each of them may require it, is a hotel-keeper under sect. 2 of the Bankrupt Act 6 Geo. 4, c. 16, and as such subject to the bankrupt laws.

A person by suffering judgment to go by default, does not "procure" his goods to be taken in execution under sect. 3 of the Bank-

rupt Act, 6 Geo. 4, c. 16, so as to be an act of bankruptcy, although his goods be afterwards taken in an execution sued out upon that judgment.

A person's "procuring" his goods to be taken in execution has no effect as an act of bankruptcy till the goods are actually taken.

A fiat in bankruptcy issued on the 7th of March 1842, and in an action of trover by the assignees for goods pledged by the bankrupt on the 28th of February, the trading was disputed. The bankrupt was a boarding-house keeper and sold wine to her boarders:—*Held*, that a paper in the handwriting of the bankrupt, purporting to be an account between her and one of her boarders, from December, 1840, to May, 1841, was not receivable in evidence to prove the trading, unless it could be shown to have been written before the bankruptcy; and held also, that a book containing accounts between the bankrupt and one of her boarders, of dates all antecedent to the bankruptcy, and to which the word "settled" was added in the bankrupt's handwriting, was also not receivable in evidence, unless it was shown that the entries were written before the bankruptcy.

If in an action of trover by assignees of a bankrupt the defendant plead that the plaintiffs are not assignees, the plaintiffs may, on that issue, give evidence of any act of bankruptcy committed before the date of the fiat, although such act of bankruptcy be later in date than the transaction which is relied on as the conversion by the defendant.

TROVER for watches and plate.—The first count of the declaration was on the possession of the bankrupt; and the second count on the possession of the assignees. Pleas—first, not guilty. Second, "that the plaintiffs are not assignees of the estate and effects of the said Emily Ann Birch, according to the statutes in force concerning bankrupts" (concluding to the country). Third, to the first count that the bankrupt was not lawfully possessed; and Fourth, to the second count that the plaintiffs, as assignees, were not lawfully possessed. Notice had been given of disputing the trading and act of bankruptcy.

The fiat, dated the 7th of March, 1842, was put in.—In it the bankrupt was described as "Emily Ann Birch, of 19, Bedford-place, Russell-square, in the county of Middlesex, lodging-house keeper, trader, dealer and chapman." The adjudication, dated the 8th of March, 1842, and the

appointment of assignees, dated the 18th March, 1842, were put in.

To prove the trading, evidence was given that Mrs. Birch, for several years before the fiat issued, had kept a boarding-house, and supplied wine by a bottle at a time to such of her inmates as required it; and that, in the latter end of 1841, she laid in a stock of twenty dozen of port wine and twelve dozen of sherry.

Humfrey, for the plaintiffs, proposed to put in a paper in the handwriting of the bankrupt, which purported to be an account between her and Miss Scott, who, for several years before the fiat had issued, was one of the inmates in her boarding-house. The account purported to extend from December, 1840, to May, 1841.

Kelly, for the defendant.—I submit that this account is not receivable in evidence, unless it can be shewn to have been in existence before the bankruptcy.

Humfrey.—The case of *Sinclair v. Baggaley* is an authority to shew that the date in an account is *primâ facie* evidence of the time of its existence (a), and all the dates in this account are long before the bankruptcy.

(a) In the case of *Sinclair*, assignee of *Gee*, a bankrupt, v. *Baggaley*, 4 M. & W. 312, which was an action for goods sold and delivered by the bankrupt, with a plea of set-off, it was held that a written paper, containing a statement of mutual accounts between the defendant and the bankrupt, by whom it was signed, bearing date previous to the bankruptcy, and showing a balance due to the defendant, was *primâ facie* evidence in this action that it was written at the time it bore date: and Lord Abinger, C. B., said, "It has never yet been held, or even

contended, that where a paper is adduced in evidence against a bankruptor his assignee, the document itself is not *primâ facie* evidence that it was made at the time it bears date, and I never yet knew an instance where the defendant was called upon to prove the actual date."

In the case of *Anderson v. Weston and Badcock*, 8 Scott, 583, which was an action against the defendants as the drawers of a bill of exchange, it was held that a bill of exchange must, in the absence of evidence to raise a presumption to the contrary, be taken to

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ALDERSON, B.—This paper, I think, does not on the face of it purport to have been made out before the bankruptcy. It is an account from December, 1840, to May, 1841; but it may very well have been made out after the bankruptcy.

The evidence was rejected.

As further evidence of the trading, *Humfrey*, for the plaintiffs, proposed to put in a book containing accounts between the bankrupt and Miss Scott of different dates, but all before the bankruptcy: the word “settled” being written in different parts of the book in the bankrupt’s handwriting.

ALDERSON, B.—This book may have been made up years after the acts were done. You must shew that the accounts tendered in evidence existed before the bankruptcy. The decision of the Court of Exchequer, of which I was a member, in *Sinclair v. Baggaley*, has been greatly doubted.

The book was not given in evidence (*b*).

As to the act of bankruptcy, evidence was given with a

have been drawn on the day on which it bears date: but in delivering judgment, Mr. Justice *Bosanquet* said, “There is, however, one exception, to which several cases apply, that is, where a bill or note is produced for the purpose of proving a petitioning-creditor’s debt to support a fiat in bankruptcy. In that case, though there may be some variance in the decisions on the subject, I apprehend it may be taken to be now settled, that some evidence beyond the mere date is necessary to show that the instrument produced for that purpose had its existence before the act of

bankruptcy took place; but the ground for requiring that proof appears to be a very reasonable and substantial one. A proceeding in bankruptcy differs from an ordinary suit: the effect of a fiat in bankruptcy is retrospective; it invalidates all transactions that take place subsequently to the act of bankruptcy, and therefore it may well be deemed insufficient, in such cases, merely to produce the instrument, without giving also the auxiliary proof.”

(*b*) See the case of *M’Namara v. Gibbs*, *ante*, p. 412.

view of shewing an act of bankruptcy on the 19th of February, 1842, and another on the 3rd of March, 1842.

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With respect to the defendant's possession of the watches and plate, which were the subject of this action, three examinations of the defendant under the fiat were put in, and from them it appeared that he had at various times, commencing in the year 1836, advanced money to the bankrupt to the amount of more than 2000*l.*; and that, on the 12th of February, 1842, he commenced an action against her to recover the amount due to him, in which judgment was suffered to go by default, and in which final judgment was signed on the 28th of that month; and that, on the same day, the bankrupt induced him to lend her £55 on the deposit of the watches and plate, which were the subject of the present action; that he did then lend her the sum of £55 and received those articles as a security; and that, on the 1st of March, 1842, he sued out a writ of fieri facias against the bankrupt on the judgment he had recovered, under which the sheriff levied on her goods on the same day.

Humfrey, for the plaintiffs, proposed to go into evidence with a view of shewing that the defendant was not in circumstances to have advanced such large sums as were mentioned by him in his examinations; and he proposed to commence this head of evidence in the year 1836.

Kelly.—I submit that the state of the defendant's circumstances in 1836 cannot be relevant on an inquiry as to whether he advanced the bankrupt a loan of £55 in 1842.

Humfrey.—I put it as shewing the improbability of the statements in his examinations.

E. James, on the same side.—The question will be, whether the bankrupt's suffering judgment to go by default in the action, which the defendant brought against her, is not

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of itself an act of bankruptcy. It is a procuring her goods to be taken in execution, which is an act of bankruptcy; and I submit that, as far as the trader is concerned, the act is complete from the time the debtor allows the creditor to send in the execution.

ALDERSON, B.—It seems to me that a person allowing judgment to go by default *suffers* his goods to be taken in execution rather than *procures* them to be so: to constitute an act of bankruptcy there must be a *procuring* the goods to be taken in execution, and that *procuring* has no effect as an act of bankruptcy till the goods are actually taken.

Kelly.—That was on the 1st of March, and the loan of the £55 by the defendant was on the previous day.

ALDERSON, B.—You have pleaded that the plaintiffs are not assignees, and on that issue they may give evidence of any act of bankruptcy before the issuing of the fiat; but if you will give up that issue, I will reject the evidence.

Kelly.—I cannot do that.

ALDERSON, B.—I think that the evidence is admissible to shew the execution fraudulent, on the issue that the plaintiffs are not assignees.

The evidence was given.

Kelly, for the defendant, submitted that on this evidence the bankrupt was not a trader within the meaning of the bankrupt laws, and that the case of *Smith* and Another, assignees of *Roberts*, v. *Scott* (c), ought to be reconsidered.

(c) 2 Moo. & Sc. 35.—In that case it was held, that one who keeps a lodging-house, supplying the guests with provisions at a small profit,

ALDERSON, B.—You may go to the Court on that point.

Verdict for the plaintiffs.

Humfrey and E. James, for the plaintiffs.

Kelly and Pashley, for the defendant.

[Attornies—*H. Lloyd*, and *W. H. King*.]

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On a subsequent day *Kelly* applied to the Court for a new trial, or to enter a nonsuit ; but the Court refused a rule.

(such provisions not forming any common stock of the house, but being set apart for the particular individual or family for whom they are procured), is an hotel keeper within the meaning of the stat. 6 Geo. 4, c. 16, s. 2, and, as such,

subject to the bankrupt law. In that case, the house was not licensed as an hotel, and there was nothing in the external appearance of the house to indicate its character, save a bill in the window on which was written "Lodgings to let."

Third Sitting at Westminster in Michaelmas Term, 1842.

BEFORE MR. BARON ALDERSON.

CHAPMAN, Public Officer of the Newcastle, Shields, and Sunderland Union Joint-Stock Banking Company,
v. BROWN. Nov. 21st.

ASSUMPSIT by the plaintiff, as public officer of the above-named banking company, upon a bill of exchange for 1264*l.* 2*s.* of which the company were indorsees. The bill having been drawn by the Northern Coal Mining Company on the defendant, and accepted by him, payable to return day of the distringas, the plaintiff ought to apply for speedy execution; in order that he may not be delayed till the next term.

In the Exchequer, if a cause be tried at the third sitting in term, and there be not four days remaining in the term after the

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the order of the drawers six months after date, and by them indorsed to the before-mentioned banking company. Plea—that the defendant did not accept the bill.

The acceptance was proved, and there was a

Verdict for the plaintiff.

Granger, for the plaintiff, applied for speedy execution, on the ground that the writ of distringas would be returnable on the 22nd of November, and the term ended on the 25th of November.

ALDERSON, B.—As there will not be four days left in the term, you will require a certificate for speedy execution—you shall have execution immediately.

Certificate for immediate execution
 granted (a).

Granger, for the plaintiff.

[Attornies—*Shield & Harwood*, and *Swain & Co.*]

(a) We believe that in the Court of Queen's Bench, if a case be tried at the third sittings in term, a certificate for speedy execution is not necessary, if the distringas be returnable on any day in that term, although there may not be four days remaining in the term after the return day of the distringas.

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Sittings at Westminster after Michaelmas Term, 1842.

BEFORE MR. BARON GURNEY.

DOMETT and Another v. YOUNG and Another.

Dec. 1st.

ASSUMPSIT on a policy of insurance on the schooner Union.—The first count of the declaration stated, that, before the death of Henry Reynolds, the plaintiffs did make assurance with the Forth Marine Insurance Company, lost or not lost, for ten calendar months, from the 1st of February to the 30th of November, 1841, upon the ship or vessel called the Union, for £600, the ship valued at £700: that the policy was made by the plaintiffs as agents for Whitwell Theaker and Henry Reynolds, since deceased, and that the defendants being partners in the said company, and two of the directors thereof, promised to perform all things in the policy contained. This count of the declaration then went on to aver an interest in the vessel, to the value of the sum insured, in Whitwell Theaker and Henry Reynolds till the time of the death of the latter, and in W. T. and Emily Reynolds, executrix of Henry Reynolds, afterwards and at the time of the loss, and stated a total loss by perils of the seas, on the 27th day of October, 1841. Second count, for money had and received. Third count, upon an account stated.

Pleas—"As to so much of the first count of the declaration as relates to the non-payment by the defendants of the sum of £170, parcel of the said sum of £600 in the said first count mentioned, and as to the last count, so far as relates to £170, parcel of the money in that count mentioned," an allegation, that "the said account stated in the said last count, as to the said sum of £170, parcel of the money in that count mentioned, was so stated of and concerning the said sum of £170, parcel of the

A ship which was insured ran aground and was much damaged. She was surveyed, and, in consequence of the report of the surveyors, was sold as she lay:—*Held*, that, to entitle the assured to recover as for a total loss, they must satisfy the jury, that, as prudent men and exercising a sound discretion, they would, if they had been uninsured, have sold the vessel as they did; and that the jury must be satisfied not only that the assured, if uninsured, would have acted as they did, but that they did prudently in so acting.

Where a defendant has paid a sum into court, and has pleaded that the plaintiff has sustained no greater damages, the plaintiff may give in evidence a judge's summons taken out by the de-

fendant two days before the trial, to allow him to pay a larger sum into court, although that summons was abandoned and no order made upon it.

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said sum of £600 in the said first count mentioned;" and a plea of payment of that sum into court, and that the plaintiffs had not sustained damages to a greater amount. "And as to the said first count, except as relates to the non-payment of the said sum of £170, parcel of the said £600, the defendants say that the said ship or vessel was, by the perils and dangers of the seas, and by stormy and tempestuous weather and the violence of the winds, a little bulged, broken, damaged, and spoiled, as in the declaration is mentioned; and that the said Whitwell Theaker and the said Emily Reynolds thereby sustained and incurred a certain average loss to the amount of the said sum of £170 above excepted, and no more, without this, that the said ship or vessel was wholly lost to the said W. T. and to the said E. R. as such executrix as aforesaid, in manner and form as is in the said count alleged" (concluding to the country (a)). As to the second count of the declaration, and as to the last count, except as to £170, parcel thereof, in the introductory part of the first plea mentioned, non assumpserunt.

Shee, Serjt., for the plaintiffs, in his opening, submitted that, if a ship was so much injured by a peril of the seas, that though her materials were left, she had ceased to exist in the character and for the purposes of a ship, this was a total loss. He cited the cases of *Cambridge v. Anderton* (b); and

(a) By the rule of Hilary Term, 4 Will. 4, No. 13, "All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country: provided that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial."

(b) 4 D. & R. 203, and 2 B. & C. 691. In that case, it appeared that the vessel was so damaged by a sea peril, that, in order to render her sea-worthy, it would cost as much to repair her as she was ori-

ginally worth, and that the captain sold her to a purchaser, who partially repaired her and sent her upon a voyage, which she never completed, in consequence of her infirmity: and it was held, first, that the underwriters were liable as for a total loss, though the vessel remained in specie at the time she was sold; and secondly, that notice of abandonment was unnecessary to entitle the owner to recover. In that case, Lord Chief Justice *Abbott* said, "If the ship remains in specie as a ship, and

Allen v. Sugrue (c); the former of which cases was recognized in the case of *Roux v. Salvador* (d).

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It appeared from the evidence, that, on the 25th of October, 1841, the Union had come to Deal with a cargo of coals, and that, as is usual with colliers at that place, she was "beached,"—which means run upon the beach for the purpose of discharging her cargo,—but that before the cargo could be discharged the wind veered from east-north-

available for the purposes of a ship, she cannot be said to be totally lost; but if she is a mere congeries of planks, utterly useless without a repair which would cost more than her value, which was the case here, then she is totally lost in every fair sense of the words;" and on *Copley, A. G.*, observing, that she was sold as a ship with her register, his Lordship added, "The name you give a thing will not alter the nature of it."

(c) 3 M. & R. 9, and 8 B. & C. 561. In that case, the ship had gone aground, and the expenses of repairing her would have exceeded what she was worth when repaired, and Lord *Tenterden, C. J.*, said, "The question in this case is, was this a total loss? The jury have found that the ship was so damaged as not to be worth the costs of repairing her. In other words, they have found that, though the materials were left, the ship had ceased to exist in the character and for the purposes of a ship. In short, that the ship was a total loss, for that, according to the decision in several recent cases upon this subject, is the legal effect and result of their finding."

(d) In the case of *Roux v. Salvador*, 4 Scott, 1, hides were shipped on board a vessel at Valparaiso for Bordeaux. The ship

sailed from Valparaiso on the 13th of May, and on the 7th of July put into Rio de Janeiro in consequence of damage by stress of weather. It being found that the hides were so much damaged that it would be impracticable to carry them in specie to the termination of the voyage, (they being in such a state that they must either have been annihilated by putrefaction or thrown overboard), they were sold at Rio for one-fourth of their value. On the 23rd of July the ship set sail from Rio on her voyage to Bordeaux, and was stranded on the 29th of September, at the entrance of the Garonne. In an action on a policy containing a memorandum, declaring "cocoa and hides free of particular average, unless the ship were stranded," it appeared that the assured received the news of the damage and of the sale of the hides at the same time; and it was held, first, that this was not a stranding of the ship within the meaning of the memorandum, so as to entitle the assured to recover for an average loss; and secondly, that the assured were entitled to recover as for a total loss without abandonment. In that case, the authority of the case of *Cambridge v. Anderton* was recognized by Lord *Abinger, C. B.*, in delivering the judgment of the court of Exchequer Chamber.

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east to south-west; and rough weather coming on, it became necessary that she should be hauled off and floated; but in an attempt to do this, an anchor came home, and the vessel drifted broadside upon the beach and sustained very considerable damage. It was further proved, that the captain caused a survey and report to be made by Captain Taylor and Mr. H. R. Reynolds, who reported that they found the vessel "very much strained all over, the butts started, the oakum washed out of the seams, and the vessel much and generally injured," but "that the full extent of the damage could not be accurately ascertained till the vessel should be placed in dock." And they recommended, for the benefit of all parties, that the schooner should be sold as she then lay, as there would be great expense, uncertainty, and risk in getting her off, and the probable repairs might exceed the value of the vessel. It further appeared, that in consequence of this survey and report, and the weather still continuing bad, the captain caused the vessel to be sold by auction in the state in which she then lay; and that her hull was bought for £105, and her spars, &c. for £80 more, by Mr. Bushell, a shipbuilder carrying on business at Deal. It was proved by Mr. Bushell, that it cost him £50 to remove the vessel from the place at which she was, and about £300 more to repair her; but that he had repaired her, and the vessel had made several voyages since. Mr. Bushell also stated, that, from having a number of men always in his employ, he had caused the vessel to be repaired on much more advantageous terms than an owner could have done; and that, if the weather had continued bad, the vessel would have been lost altogether.

It was proved by Mr. Friend, that he had surveyed the vessel before the auction, and found that "some of her floor-timbers next the keelson were broken, several butt-ends started, some of her stern-posts started, the oakum washed out, and several trenails started;" but that it was "impossible to make an accurate survey without taking up her ceiling."

Captain Taylor was called to prove the state of the vessel when he surveyed her; and he also stated, that if the weather were calm the vessel could have been got off easily; but that, under all the circumstances, he should have broken the vessel up.

With a view of shewing that the sum paid into court was not sufficient, *Shee*, Serjt., for the plaintiffs, proposed to put in a summons of Baron *Alderson*, served by one of the clerks of the defendants' attornies on Mr. Curling, one of the plaintiffs' attornies, two days before the trial. This was a summons, calling upon the plaintiffs' attornies to shew cause why the defendants should not have leave to pay a further sum of £30 into court. This summons had been abandoned, and no order had been made upon it.

Thesiger, for the defendants.—I submit that this summons is not receivable in evidence, as no order was made upon it.

GURNEY, B.—I shall receive the evidence.

The summons was given in evidence.

Thesiger addressed the jury for the defendants, and submitted, that, if the captain had exercised a sound discretion as a prudent owner would have done in case his ship had been uninsured, he would have had her repaired instead of selling her as he did. He cited the case of *Young v. Turing* (*e*), and, with respect to the summons, he submitted

(*e*) In the case of *Young v. Turing, Bart.*, 2 Scott, N. R. 752, in which the question was, whether there was a partial or a total loss, Lord Chief Justice *Tindal* told the jury, "That they were to take into their consideration the cost of the repairs on the one hand, and on the other what would be the intrinsic value of the ship to the owner under all the circum-

stances attending her, after she was repaired; and that they were to say, whether the owner of this ship, being a man of prudence and discretion, and uninsured, would, under all the existing circumstances, have repaired his ship or not; that if a prudent and discreet owner, being uninsured, would have repaired the ship, the assured ought to have done so, and the loss in

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that that did not prove that the defendants admitted a greater amount of damages than £170, because prudent persons often paid into court larger sums than they ought, from a fear of paying in too little, which would place them in as bad a situation as if they had paid in no money at all.

GURNEY, B. (in summing up).—The main question in this case is, whether the loss was a total loss, or a partial loss only; and in determining that question, you will have to consider whether the owners of the ship, as prudent men, and exercising a sound judgment, would, if they had been uninsured, have sold the vessel, as was done here, or whether they would have employed persons to try to get her off, and, if successful, have repaired the vessel for themselves; for, in order to entitle the plaintiffs in this case to recover as for a total loss, they must satisfy you, that, if they had been uninsured, they would have acted as they have done, and also that they did prudently in so acting.

The jury found that there had been a partial loss only, and it was arranged that the amount should be ascertained upon a reference.

Shee, Serjt., and *Peacock*, for the plaintiffs.

Thesiger and *Greenwood*, for the defendants.

[Attornies—*Fyson & Co.*, and *Oliverson & Co.*]

that case was only a partial loss; and if such person would not have repaired his ship, the loss was a total loss." To this direction of the Lord Chief Justice there was a bill of exceptions, but the Court of Exchequer held, that the direction of the Lord Chief Justice was right; and Lord Abinger, C. B., in delivering the judgment of that court, said, "The Lord Chief Jus-

tice has laid down the usual and recognized rule, that the jury ought to consider, whether, under all the circumstances attending the ship, a prudent owner, if uninsured, would have repaired the vessel." In that case it was also held, that, in determining this question, the jury were not to take into their consideration the circumstance of the ship being valued at £8000 in the policy.

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MACNAMARA v. HULSE and Others.

Dec. 2nd.

CASE for the infringement of a patent, dated 15th of March, 1837, for "certain improvements in paving, pitching, or covering streets, roads, and other ways." The declaration, besides the usual breaches, that the defendants used the plaintiff's invention, &c., stated that the defendants did make and cause to be made large quantities of wooden blocks, for the purpose of paving roads, streets, and ways according to the improvements of the plaintiff, and in imitation of his invention. Pleas, first, not guilty. Second, that the plaintiff was not the true or first inventor. Third, that the said invention was not, at the time of making and granting the said letters patent, a new invention within this realm, but had been and was publicly practised and used before. Fourth, that the nature of the said invention, and the manner in which the same was and is to be performed, were not nor are particularly described or ascertained by the specification. Fifth, that the said invention was not nor is of any public use or benefit. All the defendants' pleas concluded to the country, except the third, which concluded with a verification. Replication to the third plea, that the said invention was, at the time of the making and granting the said letters patent, a new invention within this realm, and had not been nor was publicly practised or known before that time (concluding to the country).

The defendants had, under the stat. 5 & 6 Will. 4, c. 83, of the block, and it was alleged that the defendant's blocks were an imitation of the plaintiff's, as two of the defendant's blocks were equivalent to one of the plaintiff's:—*Held*, that it was for the jury to say whether the defendant's blocks were in effect the same as the plaintiff's, although no single block of the defendant's was bevilled both inwards and outwards on the same side.

In such a case the specification did not state at what angle the bevils should be made, and one witness stated, that the angle was material, but another witness stated that any angle would be of some benefit:—*Held*, that if the jury thought that a bevil at any angle would be beneficial, the specification would be good, although it omitted to state any particular angle at which the bevils should be made.

If a patent be taken out for blocks for paving with "stone or any other suitable material," this will include wood pavement, although no wood pavement was in actual use at the date of the patent, and although the inventor might not have had wood pavement in his contemplation.

In an action for the infringement of a patent, the defendant cannot, by his notice of objections (given under the stat. 5 & 6 Will. 4, c. 83, s. 5), go beyond his pleas.

Semble, that if an invention, for which a patent is granted, would, if put into practice, be useful, an action for the infringement of the patent may be maintained, although the plaintiff's invention has never been put into actual use, except by the defendant, when he infringed the patent.

Where in an action for infringing a patent for blocks for pavement, the plaintiff claimed as his invention that his block was bevilled both inwards and outwards on the same side

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s. 5 (a), given to the plaintiff a notice of sixteen objections, which were in substance as follows:—First, that the mode of paving described in the letters patent was not new.

Second, that the invention does not shew any new method of cutting the materials.

Third, “that, at the time of granting the letters patent, wood pavement was not practised or known in England, and the term ‘paving’ or ‘pitching’ signifies a road laid with stones endwise; and throughout the whole patent the word ‘wood’ is not used, but only stone or other suitable materials of a similar nature, such as marble, granite, or any mineral substance, but not vegetable substance.”

Fourth, that the patent does not apply to any pitching or covering of wood, and is not applicable to, and does not authorize the making roads with wood.

Fifth, that the specification was not sufficient, because it did not state any invention, any novelty, any new process, or any new result from an old process.

Sixth, that the plaintiff’s claim is for all shapes, forms, and bevils, and no angle is defined in the specification.

Seventh, that the plan and section do not agree.

Eighth, that no exact depth of the materials is given.

Ninth, that the specification sometimes says half stones to be against the curb, but the section does not shew it.

Tenth, that iron and brick roads were tried after the in-

(a) By which it is enacted, “That in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any scire facias to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action; and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he prove

the objections stated in such notice: provided always, that it shall and may be lawful for any judge at chambers, on summons served by such defendant or plaintiff on such plaintiff or defendant respectively, to show cause why he should not be allowed to offer other objections, whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such judge shall seem fit.”

vention and patent, and that, so far as they are included in them, they are of no practical benefit or advantage.

Eleventh, that the supposed invention is of no public benefit or advantage.

Twelfth, that it was not new.

Thirteenth, that the title of the patent is insufficient and inapplicable, if it was intended thereby to extend to wood pavements, such as have been put in practice and used by the defendants.

Fourteenth, that the specification is insufficient, because it does not describe the invention so that it is fully disclosed and made known to the public.

Fifteenth, that by the specification it is not described whether the sides of the materials should be laid down at right angles with the base, or with each other, or at any angle, or in what figure; nor do the drawings supply that defect, nor does the length, breadth, or depth of the stones or other materials appear.

Sixteenth, that the depth, breadth, and length of the stones or other substances will depend on the mineral or vegetable substances used, whereas neither the specification nor drawings point out nor define what differences will be created, or how met or disposed of.

It was opened by *Pollock*, A. G., for the plaintiff, that the plaintiff had invented a block which was useful for wood pavement, the plaintiff's block being in the form of two solid rhombs, placed one in front of the other in opposite directions, so that each side of one of the plaintiff's blocks was bevelled both inwards and outwards. This block had been imitated by the defendants, each of whose blocks consisted of a single solid rhomb, and the defendants then fastened their blocks together by pins, so that two of the defendants' blocks fastened together by the pins, as they were intended to be, were exactly the same as one of the blocks of the plaintiff; and if one of the plaintiff's blocks were cut in half, so as to detach from each other the two solid

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rhombs of which it consisted, the two parts would be each of them the same as one of the defendants' blocks. It appeared from the defendants' objections, delivered under the 5th section of the stat. 5 & 6 Will. 4, c. 83, that it was to be objected that the plaintiff's patent was not taken out for wood pavement, and that the defendants meant to rely on sixteen different objections.

Lord ABINGER, C. B.—Whatever objections the defendants may have given you notice of they cannot go beyond their pleas. I apprehend that the statute does not make the notice of objections stand in the place of pleas.

Kelly, for the defendants.—The notice of objections merely states more particularly what the pleas state more generally.

Pollock, A. G.—The objection is, that wood is not specifically mentioned either in the patent or in the specification.

Lord ABINGER, C. B.—This is not a patent for wood pavement, it is for paving without any limit as to material.

On the part of the plaintiff an examined copy of the specification was put in. It was dated the 1st of September, 1837, and was as follows:—

“My invention consists in an improved mode of cutting or forming stone, or *other suitable material*, for paving or covering roads or other places, such as roofs of buildings, or floors, as hereafter described.” [Here followed a description of a drawing annexed to the specification. There was no scale attached to the drawing, and the precise angle at which the bevils were to be made was not stated.] And it concluded—“And I would have it understood, that what

I claim is the mode herein explained of forming or working the stones *or other materials* to the figures A. or B., for the purpose of producing better paving, pitching, or covering of streets, roads, and ways, and other purposes, as above described."

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It was proved by Mr. Bebbington that he had made seven of those blocks for the plaintiff, who had shewn him a copy of the specification and drawing, and also given him some verbal directions; but he stated that any person of competent skill could have made the blocks from seeing the specification and drawing only, without any verbal explanation or direction; and that, although the precise angle at which the bevils were to be made was not stated, that could not, in the witness's judgment, be material, as a bevil at any angle would be to some extent useful.

It was proved by Mr. Robertson, the Editor of the *Mechanics' Magazine*, that the subject of wood pavement had been discussed among scientific men before the year 1837; and Mr. Robertson also stated that he considered that the plaintiff's invention would be useful, and that the novelty of it consisted in the obtaining mutual support by the bevilling outwardly and inwardly on the same side of the block.

Mr. Gibbs, a civil engineer, stated that in his judgment the plaintiff's invention would be useful, "if put into practice;" but that the angle at which the bevils should be made would be material.

Kelly, for the defendants.—I submit that there is no case to go to the jury on the fifth issue, in which the defendants say that the plaintiff's invention is of no public utility. The plaintiff has on that issue to prove that it is useful, but there is no evidence of any one block made according to the plaintiff's method ever being used any where from the year 1837 to the present time—the only evidence being the speculative opinions of two witnesses, that, if carried into effect, the invention would be useful.

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LORD ABINGER, C. B.—The plaintiff says that your clients have carried it into practical effect and have found it useful.

Kelly.—There is no proof that there were any of these blocks made.

LORD ABINGER, C. B.—The first witness made some for the plaintiff.

Kelly.—They were not intended to be used.

LORD ABINGER, C. B.—It shews that they were ready.

Kelly.—I submit that it must be shewn that the invention has been brought into use; but I am quite content if your Lordship will give me the benefit of the objection hereafter.

LORD ABINGER, C. B.—Surely.

Kelly.—I submit, further, that, as the plaintiff claims as his invention the bevilling inwards and outwards on the same side of one block, the defendants have not pirated that, as they have never had any block bevilled both inwards and outwards on the same side.

LORD ABINGER, C. B.—That is a matter of fact. It will be for the jury to say whether they think the defendants' blocks in effect the same as the plaintiff's.

Kelly.—There is also in the specification no direction whatever as to the angle at which the bevils are to be made.

LORD ABINGER, C. B.—One of the plaintiff's witnesses says that the precise angle of the bevil is important, but

another of the witnesses says that any angle will be of some use. It will be for the jury to say whether any particular angle is essential, or whether any angle whatever is useful and beneficial. It must be less than a right angle, because if it was a right angle it would not be a bevil. If the specification leave it to experiment to determine what is the proper angle, it is not good; but if any angle is a benefit, it will do.

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Kelly.—I submit, further, that the plaintiff's patent does not apply to wood pavement. There was no wood pavement in actual use in the year 1837, which is the date of his patent; and then comes the question whether it can extend to any thing but stone or something then used.

LORD ABINGER, C. B.—I think that the words "any other suitable material" include a wood pavement, though probably the plaintiff never contemplated it.

Kelly addressed the jury for the defendants, and stated (inter alia) that the plaintiff's invention was not new, because a person named M'Carthy had, in the year 1818, taken out a patent for a pavement, in which each block was to have two bevils inwards and two bevils outwards on the same side of the block; and that if the plaintiff was correct in contending that one of his blocks cut in two would be the same as two of the defendants' blocks, it would be equally true, that one of Mr. M'Carthy's blocks cut in two would be the same as two of the blocks of the plaintiff; and that if the plaintiff's block were not to be considered as in effect the same as Mr. M'Carthy's, the defendants' could not be considered the same as the plaintiff's.

An examined copy of Mr. M'Carthy's specification was put in; and it was proved by Mr. Farey, that in principle the invention there described was the same as the plaintiff's.

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Pollock, A. G.—There is no doubt, that if you take M'Carthy's block and divide it, you get a bevil inwards and outwards on the same side of the block.

Lord ABINGER, C. B.—You can make the plaintiff's block by cutting M'Carthy's block into two, and you can make the defendants' block by cutting M'Carthy's block into four, and there is an end of the originality. I think so, and probably the jury think so too.

The foreman of the special jury. “We do, my Lord.”

Kelly.—The jury ought to be discharged as to the other issues.

Pollock, A. G.—If the jury are satisfied in favour of the defendants as to one issue which goes to the whole case, I think that I ought not to keep up the cause merely to determine the other issues.

Verdict for the defendants on the second issue,
and the jury discharged as to all the other
issues.

Lord ABINGER, C. B.—I may now say that my opinion was against the plaintiff as to the angle not being stated, and that the specification in that respect was insufficient.

Pollock, A. G., *Cockburn*, *Murphy*, Serjt., and *Webster*,
for the plaintiff.

Kelly, *Hoggins*, and *Warren*, for the defendants.

[Attornies—*W. Bevan*, and *Hodgson & B.*]

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BEFORE LORD ABINGER, C. B.

SMITH v. MARRABLE, Knt.

Dec. 3rd.

ASSUMPSIT for use and occupation of a furnished house. Plea, non assumpsit (a).

It was opened by *Hayward*, for the plaintiff, that in the month of September, 1842, by an agreement in writing, the plaintiff agreed to let, and the defendant agreed to take, the house No. 5, Brunswick-place, Brighton, for five or six weeks, at the option of the defendant, at the rent of eight guineas per week, the rent to commence from the date of the agreement; and that the defendant's family took possession of the house, and after occupying it for four days quitted it, and sent the key to the plaintiff, with eight guineas for a week's rent, alleging that they could not occupy the house any longer, as it was infested with bugs. The plaintiff refused to accept the key, and had brought this action for 33*l.* 12*s.* for four weeks' rent, the residue of the term mentioned in the agreement. He submitted, that if this was the defence to be offered by the

If premises be let for the purposes of occupation, it is on an implied condition that they should be fit for occupation.

If A. take a furnished house of B. for five weeks, and it be so infested with bugs as to be unfit for the occupation of a respectable family, this will justify A. in quitting it; and when in such a case the tenant quitted at the end of four days, paying a week's rent, it was held that he was justified in what he did, and was not liable for any subsequent rent.

Held, also, that in an action for use and occupation for the four weeks' rent (in which credit was given in the particulars for the rent actually paid), non assumpsit was the proper plea.

If the counsel for a plaintiff proposes to give evidence in anticipation of the intended defence, but does not do so, the judge then intimating an opinion that the defence cannot be gone into, as it was not specially pleaded, and the judge afterwards allows the defence to be gone into, and the plaintiff adduces his evidence as evidence in reply, and there be a verdict for the defendant:—*Held*, that these circumstances are no ground for granting a new trial.

(a) The declaration also contained a count upon a demise to the defendant, alleging that the defendant did not use the premises in a tenant-like manner, and assigned as a breach that three panes of

glass in the windows were broken. To this the defendant pleaded that he did use the premises in a tenant-like manner; but no evidence was offered on this part of the case.

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defendant, it was inadmissible under the plea of non assumpsit, which was the only plea to the count for use and occupation; but that if his Lordship thought that the intended defence was admissible on these pleadings, he should go into evidence to disprove it.

Lord ABINGER, C. B.—It appears to me that this defence will not be open to the defendant on these pleadings.

On the part of the plaintiff, the agreement (properly stamped) was put in. It was to the effect above stated, and it was proved that the defendant's family entered and had possession of the house, and occupied it for four days, and then left, paying rent for one week; and that the key was sent to the plaintiff, who refused to accept it.

Erle, for the defendant.—The defence in the present case is, that this house was so infested with bugs that the defendant's family found that they could not occupy it; and I submit that I am at liberty to go into this defence under the plea of non assumpsit, the plaintiff relying on the general count for use and occupation; and if I should prove that the house was not habitable by reason of the nuisances alluded to by the plaintiff's counsel, it follows as a consequence, that no implied promise in law could arise to pay rent, save in respect of the actual occupation (*b*). Here, the defendant has paid rent for the period during which he occupied the house, and this payment is given credit for in the plaintiff's particulars of demand annexed to the record (*c*). I propose, therefore, to give evidence of

(*b*) In the case of *Prentice v. Elliott*, 5 Mee. & W. 606, in an action for use and occupation, the defendant pleaded that he had the premises under a demise from the plaintiff, at a certain rent, payable quarterly, and that before the rent

became due the plaintiff evicted him from the possession of the premises; and it was held on special demurrer, that this plea was bad, as amounting to the general issue.

(*c*) By the rule of T. T. 1 Vict., it is ordered that, "In any case in

such facts as will shew that the premises were incapable of occupation, and that will entitle the defendant to a verdict on the authority of the cases of *Chapman v. Marshal* (d); *Edwards v. Hetherington* (e); *Collins v. Barrow* (f); and *Cowie v. Goodwin* (g).

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The particulars of the plaintiff's demand annexed to the record were in the following form :—

	£	s.	d.
" To five weeks' rent	42	0	0
Cr. By cash on account	8	8	0
	<hr/>		
	£33	12	0"
	<hr/>		

Lord ABINGER, C. B.—I think that the evidence is admissible.

On the part of the defendant, it was proved by several witnesses, that all the beds in the house except one were infested with bugs; and one witness stated, that on the first night of the occupying the house he caught thirty-four bugs in and about his bed, and on the second night not quite so many. Two other witnesses deposed to the state of the beds, and said, that, during the four days of the occupation of the house by the defendant's family, a considerable number of bugs were taken in the bed-rooms; that they could not sleep; that they felt these insects crawling over

which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money; but this rule is not to apply to cases where the plaintiff, after stating the amount of his demand,

states that he seeks to recover a certain balance without giving credit for any particular sum or sums. Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar."

(d) 4 C. & P. 65.

(e) 7 D. & R. 117.

(f) 1 M. & Rob. 112.

(g) 9 C. & P. 378.

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them when in bed; that the beds, mattresses, and bedsteads smelt strong of bugs.

In reply witnesses were called, who deposed to the clean state of the house; and a clergyman named Pullen, who occupied it after the plaintiff's family had left, stated that his family found no inconvenience from bugs.

Lord ABINGER, C. B. (in summing up).—Every person who undertakes to let a ready-furnished house or apartments is bound to take care that the premises are free from nuisance. The question in the present case is, whether this house has or has not been so infested with bugs, and therefore presented such a nuisance as justified the defendant's family in quitting it. If a man lets a house he does so under an implied contract that it is fit for the reception of a family; and it is his duty to take care that it is so, and that it is in a comfortable and tenantable state. It will be for you to say, whether in this instance the amount of bugs was so great as to render it impossible for any respectable family to occupy the house. If it was so, I have no hesitation in laying it down, that in my opinion the defendant has been justified in the course he has adopted. If, on the other hand, you consider that there was not a greater number of these insects than a long and hot summer would be likely to produce, and that they did not amount to a nuisance, and that the defendant merely made it a pretext for leaving the house, it will be your duty to find a verdict for the plaintiff.

Verdict for the defendant.

Hayward and Bovill, for the plaintiff.

Erle and R. A. Price, for the defendant.

[Attornies—*Blake & Tamplin*, and *Sowton*.]

In the ensuing term *Hayward* applied for a new trial on

three grounds; first, that the defence, that the premises were infested with bugs, was no ground of defence in this action; secondly, that if it were, it should have been specially pleaded; and thirdly, because he should have been allowed to give evidence in anticipation of the defence, instead of giving that evidence as evidence in reply.

The Court refused a rule on all the points; and with respect to the third, Lord *Abinger*, C. B., said, that he had at first thought that the state of the premises should have been specially pleaded, and that his opinion on that point had changed in the course of the cause; but that no injustice had been done to the plaintiff, as the whole of his witnesses were examined in reply.

PARKE, B.—As these premises were let for the purposes of occupation, it is on an implied condition that they should be fit for occupation; and the cases appear to me to warrant the propositions laid down by my Lord Chief Baron to the jury. If there was such a nuisance from bugs that no respectable family could reasonably occupy the house, the defendant had a right to give it up; and if so, the plea of non assumpsit is not only a proper plea, but the only one which would be so.

LORD ABINGER, C. B.—I am glad that authorities are to be found in support of that which I laid down at the trial; but I wanted none. It is plain good common sense, that if a man lets a house, it shall be fit for the purposes of occupation. Suppose that a landlord, perfectly unconscious of the fact, let a house in which the late tenant had died of the plague, could it be said that the new tenant was bound to stay in it? This is a less strong case; but here one of the defendant's sons said that he passed the night in catching bugs, and that he killed thirty-four. I left it to the jury to say whether the defendant's family made this a pretext for leaving the house, or whether they left it because they could not reasonably be expected to stay in

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it. They found the latter. I think there should be no rule.

ALDERSON, B., and GURNEY, B., concurred.

First Sitting at Westminster in Hilary Term, 1843.

BEFORE BARON ROLFE.

1843.

Jan. 12th.

VAIN v. WHITTINGTON.

In an action on a bill of exchange, the defendant was, by a judge's order (in the usual form), to make the admission specified in the notice to admit, and the notice called on the defendant to admit that the document therein "specified to be original, was written, signed, or executed, as it purports to have been, *saving all just exceptions to the admissibility of such document as evidence in this cause.*" The notice then described the bill of exchange in the usual manner:—*Held*, that this admission did not preclude the defendant from objecting that the bill was not properly stamped, and also that this was not such an admission as dispensed with the production of the bill.

DEBT, by the plaintiff, as the drawer, against the defendant as the acceptor of a bill of exchange, dated the 5th of August, 1842, for £33, payable to the order of the plaintiff three months after date; 2nd count, upon an account stated.

Pleas—first, to the first count, that the defendant did not accept the bill. Second, to the second count, *nunquam indebitatus*.

On the part of the plaintiff, an order of Baron *Alderson* was put in. It was in the following form:—

"Vain
v.
Whittington." } Upon hearing the attornies or agents on both sides, and by consent, I do order, that the defendant, upon the trial of this cause, hereby make the admissions specified in the notice served by the plaintiff's attorney or agent upon the defendant's attorney or agent, dated the 5th day of January, 1843.

"E. H. ALDERSON.

"Dated the 9th day of January, 1843."

The notice to admit, which was referred to in Baron *Alderson's* order, was put in, it was as follows:—

“ In the Exchequer of Pleas.

“ Between William Vain, plaintiff,
and

“ Richard Whittington, defendant.

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“ Take notice, that the plaintiff in this cause proposes to adduce in evidence the document hereunder specified, and that the same may be inspected by the defendant, his attorney, or agent, at our offices, situate No. 12, Serjeant's-Inn, Fleet-street, in the city of London, on Friday, the 6th of January instant, between the hours of eleven and one o'clock ; and that the defendant will be required to *admit* that the said document as is herein specified to be original *was written, signed, or executed* as it purports to have been, *saving all just exceptions to the admissibility* of such document as evidence in this cause. Dated this 5th day of January, 1843. “ Yours, &c.,

“ SMITH & ATKINS,

“ Plaintiff's agents.

“ To Mr. T. White, defendant's attorney or agent.

<i>Description of Documents.</i>	<i>Date.</i>	<i>Original or Duplicate served, sent, or delivered, when, how, and by whom.</i>
A bill of exchange for £33, at three months' date, drawn by plaintiff upon and accepted by defendant, and payable to plaintiff's order.	5 Augt. 1842.	Original.”

The bill of exchange was put in.

H. Hill, for the defendant.—I submit that this bill is not receivable in evidence, as it is on a wrong stamp. The stamp ought to be 3*s.* 6*d.*, but it has been only 2*s.* 6*d.*

ROLFE, B.—The stamp is so defaced that I cannot see anything on it except the words “ shillings and sixpence.”

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H. Hill.—The first line is entirely rubbed out, but there could not have been so long a word as “three” (a).

Bovill, for the plaintiff.—I submit, that, after making this admission of the bill, a party cannot make any objection to the stamp.

ROLFE, B.—He admits the handwriting to prevent the necessity of a witness coming here to prove it; but he only admits the document, “saving all just exceptions to the admissibility of such document as evidence in this cause”—one of these just exceptions to the admissibility being an objection to the stamp.

Bovill.—I submit that the order and notice to admit are sufficient to entitle the plaintiff to a verdict, without putting in the bill at all. The declaration states, that the defendant accepted a bill of exchange, at such a date, for such an amount, and, by the notice to admit and order, the defendant admits that he did accept a bill of exchange, tallying with the description in every respect. The cases of *Newhall v. Holt* (b), and *Slatterie v. Pooley* (c), decide that

(a) In the case of *Doe d. Fryer v. Coombs*, 12 Law J., New Ser., Q. B. 36, it was held that where a deed requiring an ad valorem stamp is produced bearing the appearance of having had a stamp upon it, but the nature of which, by reason of obliteration, cannot be ascertained, it was for the party objecting to the deed to give some evidence that a proper stamp had not been imposed, otherwise a presumption may be made that the deed had been duly stamped.

(b) 6 Mee. & W. 662. In the case of *Newhall v. Holt*, it was held, in an action for goods sold and delivered, and on an account stated, that a parol admission of

the debt by the defendant is evidence under the account stated, though it appears that there was a written agreement relating to the goods; and in that case Baron *Parke* said, “What a defendant says is always evidence against him, although it may have arisen out of a written agreement.”

(c) 6 Mee. & W. 664. In the case of *Slatterie v. Pooley*, it was held, that a parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument, and even though its contents be directly in issue in the cause. See also the case of *Earle v. Picken*, 5 C. & P. 542.

an admission respecting a written document may be received in evidence, without the production of the document.

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ROLFE, B.—Those cases are unlike the present. If the defendant had said, "I owe A. B. £15 on a bill of exchange," this would be evidence without producing the bill of exchange; but here, the defendant is to admit that the document was signed as it purports to have been, saving all just exceptions to its admissibility. I think that you cannot go on without producing the bill, and that when you have done so, the defendant is not precluded from objecting to its being on a wrong stamp. The plaintiff must be nonsuited.

Bovill asked for leave to move to enter a verdict for the plaintiff.

ROLFE, B.—To guard against the possibility of the expense of coming down to a second trial, I will give you leave to move.

Nonsuit.

Bovill, for the plaintiff.

H. Hill, for the defendant.

[Attornies—*Smith & Atkins*, and *White*.]

On a subsequent day, *Bovill* moved for leave to enter a verdict for the plaintiff, and cited *Starkie* on evidence (d),

(d) Mr. *Starkie* says, (Law of Ev. 1054), "After consent to a judge's order for the admission of an original instrument, or a counterpart of a deed, an objection cannot be taken to the insufficiency of the stamp;" and for this he cites the case of *Doe d. Wright v. Smith*, 2 M. & Rob. 7; but that case does not appear to support the proposition of

Mr. *Starkie*, as there the plaintiff had obtained a judge's order to admit "the counterpart of a lease from E. T. to the defendant, dated," &c. The instrument, when produced, appeared to have been executed by both parties; it was properly stamped as a counterpart, with a 1l. 10s. stamp, but as a lease, it should have borne a £2

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and the case of *Doe d. Wright v. Smith*, but the Court refused a rule (e).

WHITTINGTON. stamp. It was objected that it was not receivable in evidence, as it was a lease; but in answer to this, it was contended that under the judge's order, the defendant was precluded from saying that it was not a counterpart; and Lord *Denman*, C. J., said, "I think you have consented to admit it as a counterpart, and cannot now take *this* objection;" and his Lordship received the evidence. The case afterwards came before the Court of Queen's Bench (3 N. & P. 335), who held that the decision at Nisi Prius was right; and Mr. Justice *Patteson* said, "The defendant had an opportunity of inspecting this document before admitting it, and might then have refused to admit *as a counterpart* that which appeared to be a lease;" and Mr. Justice *Coleridge* said, "If the defendant had in this case inspected the document, he might have said

—'I admit the execution of this instrument, but I object to admit it as a counterpart, because there is no original lease, or because I have the original lease, and it varies from the supposed counterpart.' He would then have put the other party on his guard, and enabled him to bring the proper evidence forward on the trial; but if he makes the admission he lulls his opponent into security, and therefore, I think, precludes himself from taking the objection at a future time." And Mr. Justice *Littledale* observed, that a duplicate lease and a counterpart required the same amount of stamp, and that, if in the notice this had been called a duplicate, the defendant after admitting it could not have objected at the trial that it was a lease and not a duplicate.

(e) See the case of *Poole v. Palmer*, *ante*, p. 69.

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First Sitting in London in Hilary Term, 1843.

BEFORE BARON ROLFE.

CRIPPS and Others v. WELLS.

Jan. 18th.

ASSUMPSIT by the plaintiffs, as indorsees, against the defendant as maker of three promissory notes. The declaration contained three counts only. The first count stated, that, on the 28th of May, 1839, the defendant made her promissory note in writing, "and thereby promised to pay one Thomas Lediard, or his order, on demand, the sum of £125, with lawful interest from the date thereof;" which note was indorsed by Thomas Lediard to the plaintiffs. The second count was precisely similar, but was on a note for £175, "with interest from the date thereof;" and the third count was also precisely similar, but was on a note for £100, "with interest from the date thereof." Pleas—as to the sum of £301, parcel of the amounts of the notes and the interest thereon, that while Thomas Lediard was the holder of the three promissory notes, he demanded payment of them, and that after the said demand the defendant paid Thomas Lediard £301 in satisfaction of the causes of action in the introductory part of this plea mentioned; and that Thomas Lediard indorsed the notes to the plaintiffs after that payment (concluding with a verification); and as to the residue of the causes of action, a payment into court of 13*l.* 13*s.*; and that the plaintiffs have not sustained damages to a greater amount. Replication to the first plea, that Thomas Lediard indorsed the notes, and each of them, to the plaintiffs before the time of the payment of the sum of £301 to the said Thomas Lediard

If a declaration on promissory notes by indorsee against drawer, contains counts on the notes only, without any other count, and the defendant plead, as to part of the amount, payment of that sum while the payee was the holder of the notes, and, as to the residue, a payment of a further sum into court, and that the plaintiff has sustained no greater damages. Replication to the first plea, that the payment was not made while the payee was the holder of the notes; and to the second plea, that the plaintiff had sustained greater damages.—*Held*, that if the first issue had stood alone, the defendant would have been entitled to begin, but that the second

issue entitled the plaintiff to begin, although it was stated by the defendant's counsel, that, if the defendant succeeded on the first issue, the plaintiff, as matter of calculation, could not be entitled to any thing on the second issue.

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in the first plea mentioned, "without this, that the said Thomas Lediard was the holder of the said promissory notes, or of any or either of them, at the time of the said payment, in manner and form as in the said first plea is alleged" (concluding to the country); and as to the second plea, that the plaintiffs have sustained damages to a greater amount than the sum of 134*l.* 13*s.* (*a*).

(*a*) As the forms of the pleas and replication may be useful in practice, we have subjoined them.

Pleas.—And the defendant, as to the sum of 301*l.* 0*s.* 8*d.*, parcel of the three several sums of £125, £175, and £100, and of the interest thereon, in the several counts of the declaration mentioned—Saith, that from the respective times of the making of the promissory notes in the declaration mentioned, and each of them, until, at, and after the time of the making of the payment by the defendant, as hereinafter mentioned, the said Thomas Lediard was, and continued to be, the holder of the said promissory notes, and each and every of them, and entitled to demand and receive payment thereof. And the defendant saith, that after the making of the said promissory notes, and of each and every of them, and whilst the said Thomas Lediard was the holder of the same, as hereinafter mentioned, to wit, on the 3rd of November, 1840, the said Thomas Lediard demanded of the defendant payment of the said promissory notes, and of each and every of them, and thereupon the defendant afterwards, and after the said promissory notes, and each of them, had become payable by virtue of the said demand, and whilst the same, and each of them, remained unpaid, to wit, on the day and year last afore-

said, paid to the said Thomas Lediard, and the said Thomas Lediard then accepted and received of and from the defendant, the sum of 301*l.* 0*s.* 8*d.* in full satisfaction and discharge of the causes of action in the introductory part of this plea mentioned. And the defendant saith, that the said Thomas Lediard indorsed the said promissory notes, and each and every of them, to the plaintiffs as in the several counts of the declaration mentioned, after the defendant so, as aforesaid, paid to the said Thomas Lediard the said sum of 301*l.* 0*s.* 8*d.* in full satisfaction and discharge as aforesaid, and this she the said defendant is ready to verify, &c. And as to the residue of the causes of action in the declaration mentioned, the defendant saith, that the plaintiffs ought not further to maintain their action, because the defendant now brings into court the sum of 134*l.* 13*s.* ready to be paid to the plaintiffs. And the defendant says, that the plaintiffs have not sustained damages to a greater amount than the said sum of 134*l.* 13*s.* in respect of the causes of action in the introductory part of this plea mentioned, and this she is ready to verify. Whereupon she prays judgment if the plaintiffs ought further to maintain their action thereof.

Replication.—And the plaintiffs,

Jervis, for the defendant, claimed the right to begin.

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R. V. Richards, for the plaintiffs.—On the second issue the plaintiffs have to shew, if they can, that they have sustained damages to an amount above 134*l.* 13*s.*

Jervis.—This declaration contains three counts only, one on each note, and does not contain any other count; and the first issue is, that Lediard received £301 of the defendant while he was the holder of the notes. That is an issue on the defendant; and if the defendant makes that out, it follows as matter of calculation that the plaintiffs cannot have sustained damages to so large an amount as 134*l.* 13*s.*, because their damages can only consist of the residue of the amount of the notes, and the interest.

ROLFE, B.—The plaintiffs say that they have sustained greater damages than 134*l.* 13*s.* It lies upon them to prove that, if they can. If the first issue had stood alone, I should have held that the defendant was entitled to begin; but the second issue being upon the plaintiffs, I think that they are entitled to begin.

as to the plea of the defendant by her first above pleaded, say, that the said Thomas Lediard indorsed the said promissory notes, and each and every of them, to the plaintiffs, in manner and form as in the said declaration is alleged, before the time of the payment of the said sum of 301*l.* 0*s.* 8*d.* to the said Thomas Lediard by the defendant, in the said first plea mentioned, without this, that the said Thomas Lediard was the holder of the said promissory notes, or of any or either of them, at the time of the said payment in manner and form as in the said first plea is alleged.

And this the plaintiffs pray may be inquired of by the country, &c., And the plaintiffs, as to the plea of the defendant by her secondly above pleaded, say, that they ought not to be barred from further maintaining their aforesaid action against the defendant, as to the said cause of action in the introductory part of the said second plea, because they say, that they have sustained damages to a greater amount than the said sum of 134*l.* 13*s.* in respect of the last-mentioned causes of action, and this the plaintiffs pray may be inquired of by the country, &c.

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R. V. Richards, for the plaintiffs, opened the plaintiffs' case.

Verdict for the defendant.

R. V. Richards and *Whitmore*, for the plaintiffs.

Jervis and *Bramwell*, for the defendant.

[Attornies—*Jones, T. & T.*, and *White & F.*]

Second Sitting at Westminster in Hilary Term, 1843.

BEFORE BARON ROLFE.

Jan. 20th.

PHILLIPS, Gent., one &c., v. HARRIS.

A party refused to admit the handwriting of a third person to a document. The judge at chambers made the usual order for the costs of proving it at the trial; the handwriting of the document was proved, but the document itself was one which was not receivable in evidence in the cause. The Judge at Nisi Prius would not certify for the costs of proving it.

DEBT for business done by the plaintiff for the defendant as an attorney, with a count upon an account stated.

Plea, *nunquam indebitatus*.

A summons had been taken out for the admission of the handwriting of Mr. Gwynne to two letters addressed to the plaintiff, which the defendant's attorney refused to admit, and a learned Baron had made the usual order thereon (a).

The handwriting of Mr. Gwynne to the letters was proved; but *Rolfe, B.*, held that the letters were not receivable in evidence, as it was not sufficiently shewn that they had been written by the authority of the defendant.

There was a verdict for the defendant.

H. Hill, for the plaintiff, applied to the learned Baron to certify that the handwriting of Mr. Gwynne was proved, to entitle the plaintiff to the costs of proving Mr. Gwynne's handwriting to these letters.

ROLFE, B.—I cannot grant you a certificate, as I have

(a) Under the rule of 2 Will. 4, s. 20.

decided that the letters are not receivable in evidence in the cause. A plaintiff might harass a defendant with all sorts of things if he could get costs, because the defendant would not admit the handwriting of papers which are not receivable in evidence in the cause.

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Certificate refused (*b*).

Jervis and *H. Hill*, for the plaintiff.

S. Martin, for the defendant.

[Attornies—*H. Phillips*, and *Holme & Co.*]

(*b*) See the case of *Stacey v. Blake*, 7 C. & P. 404.

PROMOTIONS.

In the Vacation after Trinity Term, 1842, *Herbert Jones*, Esq., was called to the degree of serjeant-at-law.

In Michaelmas Term, 1842, *A. S. Dowling*, Esq., was called to the degree of serjeant-at-law.

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WESTERN CIRCUIT.

WINCHESTER ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE COLERIDGE.

March 1st.

ELGAR v. WATSON.

Where a tenancy is continued beyond the time for which it was originally taken, and nothing is arranged respecting the amount to be paid on the new holding, that new holding is not of necessity to be on the same terms as the former; but the jury may give the landlord a larger sum for the continued occupation, if there be circumstances to show that such increased rent was expected by him in the event of holding over, and that that understanding was not repudiated by the tenant.

ASSUMPSIT for use and occupation and for money lent. Particulars: For rent for two months, at 8s. a-week, and then, during the four months subsequent, at 14s. a-week, and also for £7 lent to defendant's servant. Pleas, *nunquam indebitatus*, and payment of £17 in satisfaction.

The plaintiff let lodgings at a watering place in the Isle of Wight. The defendant went (18th May, 1841) to engage the apartments for his child and servant. The plaintiff said the charge would be 8s. a-week for two months, for two rooms. The defendant said, if the place agreed with the child's health, he should continue the lodgings on after the two months. The plaintiff then said, "there must be a new arrangement at the end of the two months if the defendant continued to keep the apartments, because he (the plaintiff) could let them at the end of that period, and get more money for them in consequence of the 'season' commencing." The defendant said, money was no object. The child and servant remained till the 9th November fol-

Where a bill of particulars is for claims of diverse character, if the defendant pay money into court generally, he acknowledges the validity of every species of claim, and it is then for the jury to assess the damages on each.

lowing (six months), and, after the first two months, the plaintiff charged 14s. a-week for the lodgings. Nothing more had been said of raising the rent than what has been mentioned, though the defendant had been at the house twice, with other members of his family, for a day or two. Beside the above demand the servant of the defendant had, while living in the house, borrowed £7 from the plaintiff.

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COLERIDGE, J. (in summing up).—There are different considerations attaching to either portion of the money claimed in this action. First, the plaintiff says, that he admits some contract, but that not more than £17 is due. The substance of the contract was, I suppose, that the defendant did not know whether the place would suit, but he took it for two months certain; and then the plaintiff said, ‘If you stay longer there must be a new arrangement.’ It was impossible that the jury could doubt that the new arrangement meant an arrangement respecting money. But then, at the end of the two months, nothing was said as to an alteration in the charge. And it was assumed, on behalf of the defendant, that as nothing was said the price was to go on as before. There is no rule of law to that effect. The law, in these cases, exists only by the construction of the contract; generally speaking, in the absence of any new contract, the old continues; but if here, the facts and previous circumstances exclude the former agreement from attaching to the subsequent holding, I think the terms of a new tenancy remain open, and then, no new arrangement having been made, it is for the jury to say what was a fair sum to be paid under that new holding. For the second point, namely, the £7 borrowed by the servant; it had been said by the defendant’s counsel that a servant has no right to borrow money which shall be charged to her master, especially as the money had not been proved to have been laid out for the defendant’s child; yet the defendant had paid a sum into Court on the

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whole declaration, and therefore he acknowledged the plaintiff's right to claim on every item.

Verdict for the plaintiff for the whole amount.

Crowder and Poulden, for the plaintiff.

Cockburn and Ball, for the defendant.

[Attornies—*Brown & Jacob*, and *Elderton & Phillott*.]

BEFORE MR. JUSTICE WIGHTMAN.

July 13th.

REGINA v. RANDALL.

On an indictment for a nuisance, it was proved on the part of the prosecution, that the wharf (the nuisance complained of) was erected over a part of the river, between high and low water mark, where boats were used before to pass. And for the defendant it was shown that the wharf was a convenience to the public, inasmuch as boats of heavy burden could come to unlade at the wharf, which, before the building of the wharf, anchored in the middle of the river; and that the channel of the river was by this convenience kept clear.

INDICTMENT for a nuisance, in building and continuing a wharf in the navigable river Itchen. Plea, not guilty.

For the prosecution, it was proved that the wharf was built between high and low water mark, and projected over a portion of the river on which boats formerly passed.

For the defence, it was shewn that, before the erection of the wharf, there was no means of unloading trading vessels in the river, except by lightening them in the middle of the stream, and then getting them at high water on to the mud between high and low water mark. Since the erection of the wharf in question, such vessels had been unloaded at it, and thus the centre of the river was kept clear, and the general navigation improved.

It was contended for the prosecution, that, in point of law, the verdict must be for the crown, if the jury should

Held, that the question for the jury was, whether the wharf occasioned any hinderance to the navigation of the river by vessels of any description, and not whether the erecting of the wharf had caused a benefit to the navigation in general.

find that the wharf covered any part of the soil of the river over which boats formerly navigated. For the defendant, it was urged that, although the wharf covered a portion of the river over which boats formerly went, yet, that it was for the jury to say whether in *fact* any sensible nuisance or impediment, to the navigation of the river by the public, had been occasioned by the act of the defendant; and that, in coming to their conclusion, the jury were justified in taking into consideration the effect produced by the building and use of the wharf in keeping clear the channel of the river. The cases of *Rex v. Russell* (a), *Rex v. Ward* (b), and *Rex v. Tindall* (c), were cited.

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WIGHTMAN, J., (in summing up), left it to the jury to say, whether the wharf itself occasioned any hinderance or impediment whatever to the navigation of the river by any description of vessels or boats; and told them that they were not to take into their consideration the circumstance that a benefit had resulted to the general navigation of the river by the mid-channel being kept clear, as proved by the defendant's witnesses.

The jury, however, could not agree upon their verdict; and, after being locked up throughout the night, were discharged.

Bompas, Serjt., *Erle*, and *Sewell*, for the prosecution.

Crowder, *Cockburn*, and *Butt*, for the defendant.

(a) 6 B. & C. 566.

(b) 4 A. & E. 384.

(c) 6 Ad. & E. 143. See also the cases there referred to.

1842.

DORSETSHIRE ASSIZES.

BEFORE MR. JUSTICE WIGHTMAN.

July 18th.

The plaintiff refused to exercise the office of parish officer and make a rate for his district, though he had been appointed churchwarden of a chapelry within the union.

Whereupon the defendant, the clerk to the board of guardians, obtained by their direction a warrant of justices to levy the amount claimed off the plaintiff's goods under 2 & 3 Vict. c. 84, s. 1. Upon trespass brought by the plaintiff for this distress:—

Held, that this trespass was an act done in pursuance of the provisions of the Poor Law Amendment Act, and that therefore the defendant was entitled to notice of action and to the other protections afforded by 4 & 5 W. 4, c. 76, s. 104.

CARTER v. FILLITER.

TRESPASS for taking the plaintiff's goods and breaking his close.—Plea, Not guilty, "by statute."

The plaintiff had been appointed churchwarden of Wool, in Dorsetshire, for several years previous to 1841, but in that year he declined to act, on the ground that another person was appointed churchwarden for 1841, who had refused to be sworn into office. The Poor Law Commissioners afterwards issued an order requiring the parish officers of Wool to pay the portion due from that parish, as a district of the Wareham Union, formed under the Poor Law Amendment Act (a). The plaintiff refused to interfere as a parish officer in making a rate to raise the money, and contended, first, that another churchwarden had been appointed; and secondly, that Wool was a chapelry, and that the churchwarden was not therefore a parish officer, *ex officio* (b). The board of guardians directed the defendant, who was their clerk, to apply to the justices for a warrant to levy the amount under 2 & 3 Vict. c. 84, s. 1. The magistrate granted the warrant: the board of guardians entered a resolution on their book, directing the defendant that the warrant should be enforced against the plaintiff in the first instance, unless the amount was paid by the parish officers before a certain day. The plaintiff did not pay on the day appointed. The defendant sent the warrant to a constable, and directed him to go in the first instance to the plaintiff's house and seize his goods; and if the levy could not be made there, then

(a) 4 & 5 Will. 4, c. 76, s. 26.

(b) *R. v. Inhab. of North Riding of Yorkshire*, 6 A. & E. 863.

to proceed to make it off the goods of the other parish officers of Wool. The levy was made off the plaintiff's goods, which were sold, and the present action was to recover damages therefore.

The warrant issued by the justices was defective, by reason that it did not shew the jurisdiction of the justices.

It was submitted for the defendant, that the plaintiff must be nonsuited, on the ground that the defendant was entitled to notice of action, and to the benefit of the other protections which were afforded under section 104 of the Poor Law Amendment Act.

For the plaintiff it was insisted that the defendant was not so entitled, inasmuch as the trespass was not an act done in pursuance of the Poor Law Amendment Act.

WIGHTMAN, J., allowed the objection; and the plaintiff was

Nonsuited.

Bompas, Serjt., *Cockburn*, and *Hodges*, for the plaintiff.

Erle and *Barstow*, for the defendant.

[Attornies—*Pearson*, and *Filliter*.]

Afterwards, in Michaelmas Term, *Bompas*, Serjt., applied to the Court to set aside the nonsuit, and grant a rule for a new trial; but the application was refused.

1842.
CARTER
v.
FILLITER.

1842.

DEVONSHIRE ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE CRESSWELL.

July 23rd.

REGINA v. POWELL.

The prisoner made his defence before the committing magistrate, and on his trial he relied on matter of excuse wholly repugnant to his former statement. That former statement had not been given in evidence in the case for the prosecution, and therefore the Court would not allow it to be read, afterwards, to contradict the defence set up on trial.

THE prisoner was indicted for forging and uttering a certain order, purporting to be an order from Robert Petre, addressed to Messrs. N. & Son, requiring them to deliver to T. W. a ton of coals, and to place the same to the account of the said Robert Petre, with intent &c.

The prisoner's defence, on his examination before the committing magistrate, was, that the order in question was not forged by him, and the handwriting was none of his.

On the trial at the assizes, the forging and uttering were proved; but the prisoner's examination was not put in evidence. The defence now set up, was, that the prisoner wrote the order by the authority of Robert Petre's wife, and that, respecting orders of this sort, she acted for her husband.

Rowe, for the prosecution, then offered to put in the prisoner's previous denial of the handwriting contained in his examination.

CRESSWELL, J.—You might have given that evidence in chief; as you did not do so, I think you cannot offer it now to contradict the prisoner's witnesses.

Verdict—Not Guilty.

Rowe, for prosecution.*Elliott*, for prisoner.[Attornies—*Turner*, and *Friar*.]

1842.

REGINA v. JOHN NORMAN.

July 26th.

EMBEZZLEMENT.—The prosecutors were owners of a vessel, and the prisoner was in their service as her master. The vessel was chartered to carry culm from Swansea to Plymouth, for a coal merchant resident at the latter place. The culm when delivered at Plymouth weighed 215 tons, and the prisoner received payment from the coal merchant for the freight accordingly. When he was asked for his account by an owner, he delivered a statement, acknowledging the delivery of 210 tons, and the receipt of freight for so much. Being further asked whether this was all he had received, he answered, that there was a difference of five tons between the weighing at Swansea and the weighing at Plymouth, and that he had retained the balance for his own use, according to a recognized custom between owners and captains in the course of business.

Embezzlement necessarily involves secrecy and concealment. If, therefore, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping, is no embezzlement.

There was no evidence of the alleged difference of measurement in weighing, or of the custom asserted by the prisoner.

CRESSWELL, J., (in summing up).—I think that this does not amount to embezzlement. Embezzlement necessarily involves secrecy: the concealment, for instance, by the defendant of his having appropriated the money. If, instead of denying his appropriation, a defendant immediately owns it, alleging a right, or an excuse for retaining the sum detained, no matter how frivolous the allegation, and although the fact itself on which the allegation rests were a mere falsification; as if, in the present case, although it should turn out that there was no such difference as that asserted by the captain, between the tonnage as measured at Swansea and at Plymouth, or that there was no such custom as is set up. I do not say to what species

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 REGINA
 v.
 NORMAN.

of offence this may amount, but in my opinion not to embezzlement.

Verdict—Not Guilty.

Merivale, for the prosecution.

Rowe, for the prisoner.

See the case of *Rex v. Hodgson*, 3 C. & P. 422.

CORNWALL ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE ERSKINE.—(Special Jury.)

Mar. 26th.

Fox v. FRITH and Others, Partners in the West Mining Association.

In an action on a promissory note, the note purported to be "For value received in Pennance shares, pursuant to annexed contract;" no contract was in fact annexed:—*Held*, that this special description of the consideration for the note did not render it incumbent on the plaintiff to put in any contract or other document beside the note itself, in order to establish his case.

ASSUMPSIT on a promissory note for £1385.—The note was made by the defendants, and was payable to the plaintiff, and in these words:—

"£1385.

London, 17th Aug., 1839.

We jointly promise to pay J. Fox the sum of £1385, on the 1st day of August, 1841, for value received in Pennance Shares, pursuant to annexed contract.

(Signed) *Frith*, and the other Partners of the Western Mining Association."

No contract was in fact annexed. Plea, that the defendants did not make the note; with a special plea, that the plaintiff was a partner with the defendants in the same transaction, &c.

The making of the note was proved by the plaintiff, and

Crowder and *M. Smith*, for the defendants, submitted that the plaintiff was further bound to put in the contract referred to in the note; for it might be, that such instrument, on inspection, would be found to qualify the note, and to show that, in law, it was not a promissory note, but, on the contrary, that the two documents taken together amounted only to an agreement between the parties, and required that that agreement should be declared on specially.

1842.

FOX
v.
FRITH.

ESKINE, J.—The objection taken by the defendants is, not that the note cannot be read, but that the contract mentioned in it ought also to be produced and proved as part of the plaintiff's case, and that in default of such proof I ought to direct a nonsuit. But I am of opinion, that it is not necessary for the plaintiff to produce the contract. The words "For value received in Pennance shares, pursuant to annexed contract," are nothing more than a statement of the consideration for the note: that consideration need not be proved any more than in the common cases of promissory notes, where the description of the consideration is value received in coals, value received as per bill delivered, or value received in any other way.

Verdict for the plaintiff.

Erle and *Butt*, for the plaintiff.

Crowder and *Montague Smith*, for the defendants.

[Attornies—*Bull & Co.*, and *Weymouth & Co.*]

Afterwards, the Court having been moved on the point, as set out in the plea, that the plaintiff himself was a shareholder with the defendants in the mining company; they held that the plaintiff, who was only a holder of scrip, and not a registered shareholder, had but an inchoate right of partnership in the company, and not a perfect

June 2nd.

1842.

Fox

v.

FRITH.

right. That the note had not been made by the defendants as directors, nor had the plaintiff taken it with any view of depending upon his right in equity against the makers of it, and therefore

Defendants' rule discharged.

SOMERSETSHIRE ASSIZES.

(Civil Side)

BEFORE MR. JUSTICE CRESSWELL.

Aug. 9th.

HARTLEY v. MOXHAM.

The defendant let apartments in his house to the plaintiff, and on a dispute arising, he locked up one of the rooms in which there were certain wares and merchandize belonging to the plaintiff, and he kept the key, ordering the plaintiff's servant not to come on the premises again. The plaintiff himself left the house, and subsequently brought an action of trespass for the seizure of his goods :—*Held*, that there was not a sufficient seizure to support the action.

TRESPASS for seizing the plaintiff's goods. Plea, among others, not guilty.

The plaintiff rented certain rooms of the defendant in his house at Clevedon. On the day in question, the plaintiff had packed up his goods, and was about to take them away, when the defendant interfered and said the plaintiff should not remove anything until his account was paid. The plaintiff desired to know the amount of it, but the defendant said it was not then ready. Upon this the plaintiff's wife desired her servant to take the articles back again to one of the rooms rented by plaintiff. The defendant then locked up that room and kept the key. The plaintiff left the house, and on the following day the defendant ordered the plaintiff's servant not to come on the premises again; and neither the plaintiff, nor any one on his behalf, had been there since that time.

Upon these facts it was submitted, on behalf of the defendant, that the trespass in taking the goods was not proved, the defendant never having seized or had possession

of them; and that the remedy should have been sought by an action of trover.

For the plaintiff, it was argued, that to prevent a person from dealing as he pleased with his goods, and to lock them up, was a trespass; and that the defendant had by his act, acquired a sufficient possession of them to entitle *him* to maintain trespass, by reason of that possession, against any other person as a wrong-doer. *Swan v. The Earl of Falmouth* (a) was cited to show that actual seizure was not necessary to make the party a wrong-doer.

1842.
HARTLEY
v.
MOXHAM.

CRESSWELL, J.—I think this is not a sufficient seizure to entitle the plaintiff to maintain trespass.

Plaintiff nonsuited.

Erle and Barstow, for the plaintiff.

Bompas, Serjt., for the defendant.

Afterwards, in Michaelmas Term, the Court refused a rule to set aside the nonsuit.

(a) 8 B. & C. 456; an action on the case for excessive distress. There the landlord's agent went upon the tenant's premises, walked round them and gave a written notice that he had distrained certain goods lying there for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold; and then he went away, not leaving any person in possession:

it was held that this was a sufficient seizure to give the tenant a right of action for an excessive distress, and that the quitting the premises without leaving any one in possession, was not an abandonment of the distress, since the stat. 11 Geo. 2, c. 19, s. 10, gives the landlord power to impound, or otherwise secure on the premises goods distrained for rent in arrear.

1842.

Aug. 10th.

A bridge had been built before 43 Geo. 3, over a stream of water. The stream was never known to be dry, but in the winter its depth only averaged two-and-a-half feet. It was part of a sheet of water crossing low land, and at the place where the bridge crossed it, it was confined by embankments to prevent it from overflowing the adjoining meadows. The judge left it to the jury whether this structure were a bridge over a stream of water, for, if so, it was not necessary that it should be for the convenience of the public under 43 Geo. 3, c. 59, s. 5, but the county were liable to repair it.

QUEEN v. THE INHABITANTS OF GLOUCESTERSHIRE.

INDICTMENT under 22 Hen. 8, c. 5, for not repairing a certain highway next adjoining to each end of the West Warmley bridge, in the parish of Siston and Bitton, in the county of Gloucester, leading from Bristol to Marshfield. Plea, Not guilty.

The prosecutors were trustees acting under the provisions of 59 Geo. 3, intituled "An Act for repairing, &c., the roads, &c., round the city of Bristol."

The indictment was removed by certiorari, and the venue was awarded into the county of Somerset, upon suggestion and by order of the Court.

The bridge was built before the stat. 43 Geo. 3, c. 59(a), and it conveyed the turnpike road at a level from Bristol to Marshfield, between parapet walls over a stream of water, which rose in the parish of Siston, and passed through several ponds or pieces of water. This stream, at the place where West Warmley bridge crosses it, was confined between banks, which prevented its overflowing the adjacent land in the winter, when the water averaged 2½ feet in depth; but the stream was never dry at any time of the year. The approaches to the bridge, for 300 yards on each side in the several parishes of Siston and Bitton,

(a) 43 Geo. 3, c. 59. s. 5. And for the more clearly ascertaining the description of bridges hereafter to be erected (which inhabitants of counties shall and may be bound or liable to repair and maintain), be it enacted, that no bridge hereafter to be erected or built in any county, by or at the expense of any individual or private person, body politic or corporate, shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or

liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled; and which surveyor or person so appointed is hereby required to superintend and inspect the erection of such bridge when thereunto requested by the party or parties desirous of erecting the same, &c.

were out of repair on the day of taking the inquest, and before then.

For the prosecution *Regina v. Oxfordshire (b)* and *Regina v. Derbyshire (c)* were cited, in which last it was held that a *cursus aquæ* was not necessary to constitute the passage over it to be such a bridge as that the county should be rendered liable to repair it.

For the defendants, it was contended that, if this were a bridge because there was here a *flumen aquæ* with a road over it, then any board or tree laid across a stream, so that people might pass dry-shod, would be a bridge, and render the inhabitants liable to repair it. And moreover, in this particular instance, the inhabitants of Gloucestershire never yet had repaired the structure in question.

CRESSWELL, J., in summing up.—There may be such structures as have been mentioned by the counsel on behalf of the defendants. If you are satisfied that this structure is a bridge your verdict must be for the crown, for it is not disputed that it is out of repair. If it has been erected for the convenience of the public in passing over a stream of water I am of opinion that it is a county bridge, and renders the county liable to repair it, though the bridge might not have been necessary for the convenience of the public when it was built.

Verdict—Guilty.

Bompas, Serjt., applied for costs under 5 & 6 Will. 4, c. 50, s. 98.

CRESSWELL, J.—This is not the Court before which the indictment is preferred. Sect. 98 applies to cases mentioned in s. 94.

Bompas, Serjt., and *Carrow*, for the prosecution.

Erle and *Butt*, for the defendants.

[Attornies—*Osbornes & Ward*, and *Blossome*.]

(b) 1 B. & Ad. 289.

(c) L. J. Vol. 11, Mag. Cases, 51.

1842.
REGINA
v.
INHABITANTS
OF
GLOUCESTER.

1842.

WILTS SUMMER ASSIZES.

BEFORE MR. JUSTICE CRESSWELL.

Aug. 15th.

SNELGROVE v. STEVENS and Others.

A witness being sworn, and having then in court a document in his possession, is bound to produce it, if required, though he have not received any notice to produce, nor been served with a subpoena duces tecum.

TRESPASS for breaking and entering, &c.—Plea, Not guilty (by statute).

The action was for a seizure made by virtue of a warrant issued by the defendants as commissioners under a Court of Requests' Act.

It was necessary in the course of the trial to produce the record-book of the Court of Requests, and the warrant of execution; and the attorney for the now defendants was also the officer of the Court of Requests, who had custody of both the documents. He had received notice to produce the former only; and when the warrant of execution was called for by the plaintiff, the witness had it in Court, but he would not shew it.

CRESSWELL, J.—A witness here sworn to give evidence, and having a document in his possession, may be compelled to produce it; he is just as much under the control of the Court in this respect as if he had brought the document under a subpoena duces tecum.

The document was produced.

Erle, Bere, and Merewether, for the plaintiff.

Crowder and Butt, for the defendants.

[Attornies—*Brett, and Bush & Son.*]

1842.

Aug. 15th.

STEVENS v. CLARK, Esq.

TRESPASS.—For false imprisonment.

Plea, General issue, "by statute."

Samuel Noble, and Anne his wife, came before the defendant, who was a justice of the peace for the county of Wilts, and complained against the plaintiff for a nuisance. The defendant then issued a summons to the plaintiff to appear and answer the complaint at the petty sessions on a certain day. But before that day the defendant was informed that the plaintiff was going out of the jurisdiction of the defendant, and he thereupon sent for the superintendent of the police, and told him he was wanted to take the plaintiff into custody. The complainant and his wife were present, and the defendant read over an information which was concerning the plaintiff leaving the town, and then a warrant to take him into custody was signed by the defendant, and delivered to the constable.

On the part of the defendant the information was not put in, but the summons and warrant only.

CRESSWELL, J., to *Erle*, who was of counsel for the defendant.—Have you any authority that the warrant itself is evidence of an information? If not, you must give evidence of the information upon which the warrant was issued; and in the absence of such evidence, I think that the warrant does not prove that there was an information on oath upon which to found it.

Erle.—There is a difficulty about the information, and I do not put it in. The question therefore will be one of damages only.

CRESSWELL, J., (in summing up).—If a magistrate issues a warrant, he must be able to shew his information, else there is no foundation for the warrant. There is a summons in this case, and as the plaintiff, it appears, was going off, the

After a summons issued, information was given before the magistrate that the party against whom the summons had been granted was going out of the magistrate's jurisdiction, who thereupon issued his warrant, and the person was taken into custody and afterwards brought his action against the magistrate for false imprisonment. At the trial the summons was put in evidence, and the warrant, but not the information:—*Held*, that the evidence was not sufficient, and that the magistrate must put in the information to justify his warrant for apprehension, for that, without a proper information, the magistrate is guilty of an act of false imprisonment in issuing his warrant.

1842.
 STEVENA
 v.
 CLARK.

constable takes him on a warrant from the defendant. There is, therefore, here a warrant without information on oath upon which to ground it. The warrant is executed, and therefore the whole imprisonment is illegal. The verdict must be for the plaintiff.

Verdict for the plaintiff.

Crowder, Bere, and Merewether, for the plaintiff.

Erle and Moody, for the defendant.

[Attornies—*Brent*, and *Webber*.]

BRISTOL ASSIZES.

BEFORE MR. JUSTICE WIGHTMAN.

Aug. 24th.

COOK v. W. LONG.

The defendant's father owed the plaintiff money for goods sold; and for the price of these goods, the defendant made his promissory note in his own name, and gave it to the plaintiff, who was cognizant of all the facts, and that the defendant had received no consideration for the note:—*Held*, that the above circumstances could not be given in evidence under a plea of "accommodation bill," and that there was in this case an original liability on the part of the defendant, and that for a good consideration, viz. family affection.

DEBT by the indorsee of a promissory note against the maker.

Plea, No consideration, and that the defendant made the note for the accommodation of R. Long, and that the plaintiff received the note with notice to that effect, that there was no consideration for the delivery of the note to the plaintiff, and that he held it without value.

The defendant's father bought sheep of the plaintiff, and for the payment for them the defendant gave the plaintiff a promissory note in his own name. There was not any consideration to the defendant for the note, nor was the defendant in partnership with his father in any manner.

It was submitted for the defendant, that the note in

question was for the accommodation of another person, and that the plaintiff taking it with notice took it as described in the plea, with all the consequent disabilities attaching to it as an accommodation note.

1842.

Cook
v.
Long.

WIGHTMAN, J.—It is not properly a note for the accommodation of any one; it is a note given and a sum of money due for a bygone debt; but it is an original liability on the part of the defendant, and the consideration of the debt is family affection. I think that on these facts the plaintiff is entitled to his verdict.

Verdict for the plaintiff.

Stone, for the plaintiff.

Erle, for the defendant.

[Attornies—*Woodford*, and *Shattock*.]

REGINA v. LUCY.

Aug. 25th.

INDICTMENT on the 58th sect. of the Reform Act, 2 & 3 Will. 4, c. 45, for giving a false answer at the time of voting for members of Parliament. The first count stated, that there had been an election of members to serve in Parliament for the city of Bristol, and that the defendant claimed to be entitled to vote at such election in respect of the occupation of a certain house in Lodge-street; that the defendant tendered his vote, and the sheriff's deputy put the following question to him (2 Will. 4, c. 45, s. 58):—"Have you the same qualification for which your name was originally inserted in the register of voters now in force for the city and county of Bristol?" To which he made answer, "I have;" whereas the said defendant had not, &c.

A voter having changed his residence since the last registration, cannot be indicted under the 2 W. 4, c. 45, for swearing that he has still the same qualification, if the sheriff's deputy should omit, at the time the voter tenders his vote, to read over to him the specific qualification from the register.

The sheriff's deputy stated, that, on the defendant tendering his vote, he had asked him the question as set out

1842.

REGINA
v.
LUCY.

in the first count; but that he did not, at the end of that question, read from the register the line in which Mr. Lucy's name and qualification were inserted.—“Lucy, William, House, Lodge-street.”

WIGHTMAN, J.—The particular qualification ought to have been read over. As it is, the defendant could not be indicted for wilfully, knowingly, and falsely giving a wrong answer (a).

His Lordship directed an acquittal.

Verdict—Not Guilty.

Butt and Stone, for the prosecution.

Bompas. Serjt., and *J. G. Smith*, for the defendant.

[Attornies—*King*, and *H. W. Hall*.]

(a) 2 Will. 4, c. 45, ss. 27, 28, 58. The third question in s. 58 is in these words, “Have you the same Qualification for which your name was originally inserted in the Register of Voters now in force for the County of &c., [or, for the — Riding &c., or for the City &c. ? as the case may be, specifying in each case the particulars of the qualification as described in the register.”] See the case of *Reg. v. Dodsworth*, 8 C. & P. 218 ; and the cases of *Reg. v. Bowler*, *Reg. v. Ellis*, and *Reg. v. Spalding*, post.

1842.

Aug. 29th.

ROWCLIFFE v. MURRAY, LARKIN, and PETTY.

TRESPASS for assaulting the plaintiff and taking him from the council-house in Bristol to a police-station there, and to the Great Western Railway Terminus, and from there to Oxford, and there detaining him in prison for twenty-five days. All the circumstances of the trespass were laid, severally, to have been "without reasonable or probable cause."

Plea by Murray and Larkin, Not guilty. Petty pleaded specially, that a gelding of his had been stolen in Oxfordshire, and that, suspecting the plaintiff to have stolen it, he went from that county with the other two defendants, constables in the county of Oxford, to Bristol, where the plaintiff lived, and found the horse in his possession, wherefore he, Petty, requested the other two defendants, *being then constables*, to carry the plaintiff before the mayor of Bristol to be examined touching the premises, the said mayor then being the nearest justice, &c.; that the mayor said he had not any jurisdiction in the matter, as the horse had been stolen in the county of Oxford; and that the defendant Petty did then request the other defendants, being constables, &c., to take the plaintiff to Oxford; and that the magistrate at Oxford made out his warrant of committal and delivered it to the constables Murray and Larkin.

The defendants Murray and Larkin were police-constables, but not of Bristol. Petty was a private individual whose horse was alleged to have been stolen, and the plaintiff was suspected of the theft.

No application was made to the Bristol magistrates by the defendants Murray or Larkin for a warrant before they took the plaintiff; and it was not proved on behalf of the defendant Petty that any horse of his had been stolen, or that the horse found upon the plaintiff was that of this defendant.

The circumstances of the plaintiff's trial at Oxford on

Trespass was brought against three defendants for an assault committed in Bristol. Two of them were constables of Oxford, and had come down and taken the plaintiff at Bristol (thus committing the assault) on suspicion of his having stolen a horse belonging to the other defendant in Oxfordshire. The declaration set out all the trespasses to have been done *without reasonable or probable cause*. The two constables pleaded not guilty only: —*Held*, that they might give the special matter in evidence in mitigation of damages, to show that there was reasonable and probable cause; but, *semble*, having acted out of their jurisdiction, they were not entitled as constables under 21 Jac. 1, c. 12, s. 5, to give the special matter in evidence under the general issue as a defence of the trespasses.

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 ROWCLIFFE
 v.
 MURRAY.

1st March, 1841, were shewn, the evidence given against him by the defendant Murray, and his subsequent acquittal.

For the defendants Murray and Larkin, evidence was offered, in mitigation of damages, to show the circumstances under which they acted as constables in this transaction; but it was objected to on the authority of those cases which rule that no evidence can be given for any collateral purpose which is excluded, by reason of its not having been specially pleaded, from being heard as a defence to the action. And it was answered, that these defendants, though they were not constables of Bristol, nor had any warrant from a Bristol magistrate, and though they committed the trespass alleged in Bristol, and therefore out of their jurisdiction, were nevertheless acting as constables in seizing a man whom they suspected had been guilty of a felony; that they were within the provisions of 24 Geo. 2, c. 44, s. 8 (a); and that in the case of *Barton v. Williams* (b), decided under that statute, it was said by *Abbott, C. J.*, that the officer is entitled to the protection of this section (the 8th), provided he act *bonâ fide* in his character of officer, and under a belief that he is exercising the authority with which he is invested; and that the constables, therefore, acting *bonâ fide* were protected, though by mistake they acted wrong; and then they came within the provisions of 21 Jac. 1, c. 12, s. 5. They might, therefore, perhaps give the special matter in evidence even as a defence, but that even if they could not, the evidence was receivable in mitigation of damages.

WIGHTMAN, J.—I think this case is not within the

(a) 24 Geo. 2, c. 44, s. 8. No action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough, or other officer or person acting as aforesaid, unless commenced within six calendar months

after the act committed. . . . ("The object of this section differs from that of the sixth section, being intended for the benefit of persons who intend to act right, but by mistake act wrong.") *Roscoe's Ev.* edit. 4, p. 584.

(b) 3 B. & A. 333.

principle of the 21 Jac. 1, c. 12, s. 5, as relating to the protection afforded to constables who have done any thing touching or concerning their office being empowered to plead the general issue and give the special matter in evidence. But I think that here evidence of the special matter may be given in mitigation of damages, because the declaration avers that the trespasses were committed without any reasonable or probable cause (c).

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 ROWCLIFFE
 v.
 MURRAY.

The evidence was given.

WIGHTMAN, J., in (summing up).—The only question is, whether the defendants caused the imprisonment of the plaintiff, and if so, what are the damages? The defendants Murray and Larkin have pleaded not guilty. Petty has put a defence on the record, which, however, has not been proved, for there has been no evidence that any horse of his was stolen, or that the horse found upon the plaintiff's premises was that alleged to have been stolen. The whole question, therefore, reduces itself to a denial of the imprisonment. But since it is alleged in the declaration, that the imprisonment was without reasonable and probable cause, it is right for you to consider, in as-

(c) 21 Jac. 1, c. 12, s. 5. If any action upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of peace, mayor, or bailiff of city or town corporate, headborough, portreeve, constable, tithing-man, collector of subsidy or fifteens, churchwardens, and persons called sworn-men, executing the office of churchwarden or overseer of the poor and their deputies, or any of them, or any other which, in their aid and assistance, or by their commandment, shall do any thing

touching or concerning his or their office or offices, for or concerning any matter, cause, or thing by them, or any of them, done, by virtue or reason of their, or any of their office or offices, the said action shall be laid within the county where the trespass or fact shall be done and committed, and not elsewhere; and it shall be lawful to and for all and every person and persons aforesaid to plead the general issue, and give the special matter in evidence.

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 v.
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assessing the damages, whether the defendants acted bona fide.

Verdict for the plaintiff. Damages, 40s.

Bompas, Serjt., *Erle*, and *Taprell*, for the plaintiff.

Crowder, for the defendants Murray and Larkin.

Cockburn, for the defendant Petty.

[Attornies — for the plaintiff, *H. W. Hall*; for the defendants, *Gamlen* and *Chilton*.]

NORTHERN CIRCUIT.

LIVERPOOL SUMMER ASSIZES.

(*Crown Side*.)

BEFORE LORD DENMAN.

Aug. 29th.

THE QUEEN (on the Prosecution of ANNE CRELLIN) v.
 SAMUEL MARTIN COPELAND, otherwise called S.
 MARTIN.

The prisoner paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which promise she afterwards refused to ratify. He then threat-

FALSE PRETENCES.—It was agreed to rest the prosecution on the third count of the indictment, which charged the defendant with having falsely pretended to A. C., then being a single woman, that he was an unmarried man, and having thereby obtained a promise of marriage from the said A. C.; that she refused to marry the defendant, and

enened her with an action, and by this means obtained money from her. During the whole of the transactions the prisoner had a wife. On an indictment against him for obtaining money under false pretences, the pretences laid were, first, that he was unmarried; secondly, that he was entitled to bring and maintain his action against her for a breach of promise of marriage:—*Held*, (Lord Denman, C. J., and Maule, J.,) that the fact of the prisoner paying his addresses was sufficient evidence for the jury on which they might find the first pretence, that the prisoner was a single man and in a condition to marry; and per *Maule, J.*, that there was sufficient evidence on which to find the falseness of the other pretence, that he was entitled to maintain his action for breach of promise of marriage, and that such latter false pretence was a sufficient false pretence within the statute.

that he falsely pretended, at the time of such refusal, that he was an unmarried man, and entitled to bring an action against her for the breach of promise of marriage, by means of which he obtained from her 100*l*. Whereas, in truth, &c., he was not an unmarried man, and not entitled to maintain an action for the breach of promise of marriage against her (a).

The fact that the prisoner was a married man was proved; and Anne Crellin, the prosecutrix, stated, that she being a single woman, and possessed of considerable property, the prisoner had paid his addresses to her, and that she had

(a) The 3rd count was in the following form: "And the jurors aforesaid upon their oath aforesaid, do further present, that the said Samuel Martin Copeland, otherwise called Samuel Martin, on the day and year, &c., unlawfully did falsely pretend to the said Ann Crellin, then and there being a single woman, that he was a single and unmarried man, and thereby then and there obtained a promise of marriage from the said Ann Crellin, to wit, a promise that in consideration that he would marry her she would marry him. And the jurors, &c., do further present that the said Ann Crellin afterwards, to wit, on the day and year, &c., wholly refused to marry the said Samuel Martin Copeland, otherwise called &c. And the jurors, &c., do further present that the said Samuel Martin Copeland, otherwise called &c., afterwards, to wit, on the day and year, &c., unlawfully did falsely pretend to the said Ann Crellin that he was, at the times of the said promise and refusal in this count mentioned, a single and unmarried man, and entitled to bring and maintain an action for breach of the

said promise of marriage against her the said Ann Crellin; by means of which said last-mentioned false pretences in this count mentioned, the said S. M. Copeland, otherwise called &c., did then and there unlawfully obtain from the said Ann Crellin, one promissory note of the governor and company of the Bank of England, for the payment of £100, &c." (*describing various kinds of money and securities*), "of the property and moneys of the said Ann Crellin, with intent then and there to cheat and defraud her, the said Ann Crellin, of the same: *whereas*, in truth and in fact, the said S. M. Copeland, otherwise called &c., was not, at the time of the said promise of marriage in this count mentioned, or at the time of the said refusal in this count mentioned, a single man or an unmarried man, nor was he at either of those times, or at any other time entitled to bring or maintain an action for breach of the said promise of marriage against the said Ann Crellin," &c.; against the form of the statute, &c.

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consented to marry him, she being ignorant, at the time, that he was already married. She further stated, that, after promising to marry the prisoner, she changed her mind, and wished to "be off" the match; that she intimated as much to the prisoner, and that he, thereupon, threatened her with an action at law for breach of promise of marriage, and, he added, that, by means of such proceeding, he could take half her fortune from her; and that she, believing that he could and would carry his threat into effect, and in order to induce him to refrain from doing so, agreed to pay and did pay him a sum of money. The money was paid and received on a written stipulation (produced at the trial) that, in consideration of such payment, he (the prisoner) would forego proceedings at law against the prosecutrix, for promise of marriage broken by her. She stated, on cross-examination, that, but for the prisoner's threat of bringing an action, she would not have paid the money; and that she was induced by such threat to pay it: and, she added, that, had she known that the prisoner was a married man, she would not have paid the money.

On behalf of the prisoner, it was submitted that there must be an acquittal, because the prosecutrix had *disproved* that the money was obtained from her by means of the false pretences laid. Admitting that false pretences might be by conduct and demeanour, and do not of necessity imply language, it appeared here, that the money was obtained, *not* by a pretence that the prisoner was single, or that he was entitled to sue, but by a threat that he *would bring an action*. This was either a mere menace and no false pretence at all, or if a false pretence, it was a pretence, not of any existing fact, but of something prospective; and for aught appearing it was not a *false* pretence, inasmuch as it may have been the prisoner's intention to take the proceedings threatened. Again, if it be said the prisoner pretended that he was entitled to sue, such pretence was rather a pretence of matter or

law, than of any existing fact: and, further, the prisoner *was* entitled to bring an action, although, by proper pleading and evidence, he, in such an action, would have been defeated.

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For the prosecution, it was contended that there was evidence to go to the jury, that *by means* of the prisoner's falsely pretending, by his conduct in addressing the prosecutrix as a suitor, that he was single and in a condition to marry her, the money was obtained. It is not necessary that *all* the false pretences laid be proved: it is enough if some one divisible and sufficient false pretence be shewn; and, beyond all doubt, there is evidence that the prisoner falsely pretended that he was a single man. But it is said that this false pretence did not extort the money: for that, but for the threat of an action, this pretence would have been of no effect. The answer is, that *but for* the false pretence in question, the threat would have been absurd, and, of necessity, inefficacious: and that, upon a reasonable construction of the statute, money may be said to be obtained "by" or "by means of" false pretences, if the false pretence enters, as a mainly influential part, into the entire representation made to the person cheated, although it may not stand alone, or be the sole incentive. Further, there was evidence of a sufficient false pretence in this, that the prisoner was entitled to "bring and maintain" an action for breach of promise of marriage. The meaning of the representation, that he could and would sue the prosecutrix was this—that existing facts were such as to enable him to commence, and successfully to prosecute, an action: and this was false in both branches. True it is any one may purchase a writ, and, in that sense, be "entitled" (that is, have the *power*) to commence any kind of action against another. But, so, A. has the power to enter on the close of B., or to convert C.'s chattels, if he can seize them; but he is not, therefore, "*entitled*" to do either of these things. And it is as much a wrongful and unlawful act (though differently punish-

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able) to sue forth process without ground of action, (either honest or technical), as it is to commit a trespass, or to be guilty of a conversion. At all events, the prisoner was not in a situation to "maintain," that is, to prosecute to a successful issue, such an action; nor could it be contended, that this pretence was of a matter of law. The law is so plain that no one could have been misled as to it: the pretence was (as before urged) of the existence of those matters of fact which the law notoriously requires, in order to the maintenance of such an action as the prisoner threatened to bring and maintain against the prosecutrix.

Lord DENMAN, C. J., allowed the case to proceed; reserving the sufficiency of the evidence of the false pretences laid, for consideration. At the close of the case, his Lordship left it to the jury to say, whether the money was, in fact, obtained by the false pretence that the prisoner was single: and a verdict of "Guilty" was returned. On the following day his Lordship intimated that he had conferred with Mr. Justice *Maule*, and that they were both clearly of opinion that there was evidence to go to the jury, that the money was obtained by the false pretence that the prisoner was a single man and in a condition to intermarry with the prosecutrix; and that Mr. Justice *Maule* was further of opinion that there was, also, evidence of the money having been obtained by the false pretence of the prisoner, that he was entitled to maintain an action for breach of promise of marriage; and that such latter false pretence was a sufficient false pretence within the statute.

Verdict—Guilty.

Baines, Crompton, Wilkins, and Atherton, for the prosecution.

Roebuck and Aspinall, for the prisoner.

[Attornies—*Shuttleworth & Snowball*, and —.]

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DURHAM SPRING ASSIZES, 1842.

(Crown Side.)

BEFORE MR. JUSTICE WIGHTMAN.

REGINA v. CANT.

MISDEMEANOR.—The defendant was indicted for disobeying an order made by William John Sawrey Morritt, Esq., and the Venerable Archdeacon Headlam, who were magistrates of the North Riding of Yorkshire, and also of the county of Durham.

The order was as follows :—

“At a Petty Session of the Peace, held at the Morritt Arms, Greta Bridge, in the North Riding of the County of York, in and for the Division of Gilling West, in the said North Riding, on the 30th day of March, 1841, before us, two of Her Majesty's Justices of the Peace in and for the said Riding and County.

“Whereas several townships and parts of the Teesdale Union, in the counties of Durham and York, are situate within the division aforesaid: And whereas application hath this day been made to us, the justices of the peace holding the said session, by the guardians of the poor of the said union, for an order upon William Cant to reimburse the said union for the maintenance and support of a male bastard child, of which its mother, Margaret Bottoms, hath lately been delivered, and which hath lately become chargeable to the township of Holwick, situate within the said union, and respecting which child no application hath been made to any court of general

A magistrate residing within a poor-law union, is only a guardian ex officio under the Poor Law Amendment Act, while he is acting as such guardian.

Two magistrates made an order of filiation under the stat. 2 & 3 Vict. c. 85, upon the complaint of the guardians of the T. Union. Both the magistrates resided within the T. Union, and were therefore guardians ex officio of it, and one of them was a rated inhabitant of a township within the T. Union, but not that in favour of which the order was made; one of the magistrates had on other occasions acted as a guardian ex officio, but neither had

acted as guardian in anything respecting this matter:—*Held*, that the order was good.

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quarter sessions, under the provision of an act passed in the fifth year of the reign of his late Majesty, intituled 'An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales:'. And whereas it hath been duly proved before us, that the said William Cant hath had ten days' due and legal notice under the hands of the said guardians of their intention to make here this application, and hath not appeared by himself or his attorney; and we having proceeded to hear the said application and the evidence thereon, and it being duly proved here to our satisfaction, well as upon the oath of the said Margaret Bottoms, corroborated in some material particular by other testimony as otherwise, that the said child was, on the 9th day of February last (and since the passing of the said before-mentioned act of Parliament), born a bastard of the body of its said mother, and did, on the 6th day of March last, by reason of the inability of its said mother to provide for its maintenance, become chargeable to the said last-mentioned township, as aforesaid; and that the said William Cant is really and in truth the father of the said child: Now, therefore, we do hereby adjudge all the said premises to be true; and it appears to us here, under all the circumstances of the case, just and reasonable that we should order, and we do hereby accordingly order, that the said William Cant shall and do, upon demand, reimburse and pay, unto the guardians of the poor of the said union, the sum of nine pence, duly proved before us here to have been already expended by them for the maintenance and support of the said child from the time when it became chargeable as aforesaid up to the present time; and do and shall reimburse and pay to the said guardians for the time being, weekly and every week henceforth, until the said child shall have attained the age of seven years (if the said child shall so long live and continue chargeable as aforesaid), such sum or sums of money as shall be weekly expended by the said union for the maintenance and support of the said child during

the time last aforesaid, not exceeding the sum of three shillings weekly.

“ Given under our hands and seals, at the session aforesaid.

“ W. J. S. MORRITT (L. S.)

“ JOHN HEADLAM (L. S.)”

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It was opened by *Otter*, for the prosecution, that Archdeacon Headlam and Mr. Morritt, who had made the order, were magistrates for the West Riding of Yorkshire, and also for the county of Durham, and that Mr. Morritt and Archdeacon Headlam both resided within the Teesdale Poor Law Union, and were therefore guardians ex officio of that union; and that Archdeacon Headlam was a rated inhabitant in the township of Thorpe, which was within that union, several parts of which were in the division of Gilling West, Archdeacon Headlam having acted as chairman of the board of guardians of that union on several occasions, but he had not acted in any way as a guardian in any of the proceedings against or relating to the present defendant. By the Poor Law Amendment Act, 5 & 6 Will. 4, c. 76, s. 72, it had been enacted, that orders of this kind should be made at the quarter sessions; but by the stat. 2 & 3 Vict. c. 85, the jurisdiction was transferred to the magistrates of the “special or petty sessions in and for the division or borough within which such union, parish, or any part thereof, shall be situated;” and as by the stat. 4 & 5 Will. 4, c. 76, it is enacted, that all magistrates residing within a union should ex officio be guardians, it will often happen that they must be the same persons, and the only persons, by whom an order must be made under the stat. 2 & 3 Vict. c. 85. In the case of *Rex v. The Inhabitants of Great Yarmouth (a)*, it was held, that an order of removal signed by two justices, one of whom at the time was churchwarden of the removing parish, was

(a) 6 B. & C. 646.

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bad on the ground that he was one of the complainants, as well as being one of the magistrates: but in the present case, the two magistrates who made this order were not then acting as ex officio guardians, but as magistrates. With respect to the point that Archdeacon Headlam was a rated inhabitant, it should be observed, that he was a rated inhabitant of Thorpe, which, though within the union, was not the place to be benefited by this order; and further, by the stat. 16 Geo. 2, c. 18, s. 1, magistrates are enabled to do all acts relating "to the laws for the relief, maintenance, and settlement of poor persons," notwithstanding they are rated inhabitants of the place affected by such acts.

Granger, for the defendant.—This order is made upon the complaint of the guardians of the Teesdale Union, of whom Archdeacon Headlam is certainly one ex officio; and if the order in the case of *Rex v. The Inhabitants of Great Yarmouth* was bad because it was made on the complaint of the churchwardens, one of whom was one of the magistrates who made the order, so I submit that this order must be bad, as it is on the complaint of the guardians, one of whom is one of the magistrates who made this order. It is true that Archdeacon Headlam did not act as a guardian with respect to this matter, but still he is a guardian, and therefore one of the complainants.

WIGHTMAN, J.—The question is new and deserves consideration. If there is no disputed fact, the defendant had better plead guilty, and I will reserve the case for the opinion of the Judges.

The defendant pleaded guilty.

Otter, for the prosecution.

Granger, for the defendant.

[Attornies—*Barnes*, and *Marshall*.]

The case was afterwards considered by the fifteen Judges, who unanimously held the conviction right; and their Lordships were of opinion that Archdeacon Headlam was a guardian when he acted as such, and then only; and that here he did not so act.

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APPLEBY SUMMER ASSIZES.

BEFORE MR. JUSTICE MAULE.

REGINA v. ATKINSON.

EMBEZZLEMENT.—The first count of the indictment charged that the prisoner, “being employed as clerk to John Teather and others,” embezzled a sum of £53, on the 14th of February, 1842. The second and third counts were similar, but applied to two other sums of money. The fourth, fifth, and sixth counts differed from the first, second, and third, in stating that the prisoner, “being employed for the purpose and in the capacity of a clerk to the said John Teather and others,” embezzled the three sums. The seventh, eighth, and ninth counts were similar, except that they stated that the prisoner, “being employed as clerk to John Teather, one of the public officers of the Carlisle and Cumberland *Banking Company*,” embezzled the three sums of money. The tenth, eleventh, and twelfth counts differed from the three preceding counts only in stating the prisoner to have been employed “for the purpose and in the capacity of a clerk to the said John Teather, as such public officer of the said Carlisle and Cumberland *Banking Company* as aforesaid.” The thirteenth count was for a larceny by the prisoner, as clerk to “John Teather and others,” of money and bank notes, the property of John

A clerk of a joint-stock banking company, established under the stat. 7 Geo. 4, c. 48, may be convicted of embezzling the money of the company, although he is a shareholder or partner in such company.

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Teather and others. The fourteenth count was for larceny, but stated the prisoner to be clerk to, and the money, &c., to be the property of, John Teather, one of the public officers of the Carlisle and Cumberland *Banking Company*.

It appeared in evidence that the prisoner was employed as a clerk in a banking company, established under the stat. 7 Geo. 4, c. 46, and a return as required by the fourth section of that statute had been made, and was proved by a certificate under the sixth section. In this return, the "true name, title, or firm of the copartnership" was stated to be "The Carlisle and Cumberland *Joint Stock Bank*:" and the "names or firms of the banks established, or to be established by the copartnership," were stated to be "Carlisle and Cumberland Bank," at Carlisle; "Carlisle and Cumberland Bank," at Wigton; and "Carlisle and Cumberland Bank," at Appleby; and John Teather was described as being a partner, and one of the public officers.

It was proved by Mr. Nelson, the manager of the bank, that the usual and only name employed by the copartnership in their dealings was the "Carlisle and Cumberland *Banking Company*," and they were so described in a bond of the prisoner to the company, which was given in evidence. It further appeared, that during the time of all the transactions in question, the prisoner was a shareholder or partner in the company.

Murphy, Serjt., for the defendant.—I submit, first, that there is a variance between the indictment and the proof, as the certificate proves the true name of the copartnership to be different from that laid in the indictment; and secondly, that the prisoner, being a partner in the company, cannot be indicted for embezzlement, notwithstanding the 9th section of the stat. 7 Geo. 4, c. 46, the object of that enactment being (as I submit) only to allow a public officer to be named instead of naming all the partners, or all the partners except one, in cases where it would be necessary to name all or all except one, but not to make any

thing indictable which would not have been so independently of that enactment.

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MAULE, J.—I will reserve the case for the consideration of the Judges.

Verdict—Guilty.

Knowles and *Ramshay*, for the prosecution,

Murphy, Serjt., for the prisoner.

[Attornies—*Hodgson*, and *Wilson & Scott*.]

BEFORE LORD DENMAN, C. J., TINDAL, C. J., LORD ABINGER, C. B., PATTESON, J., GURNEY, B., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., ERSKINE, J., MAULE, J., and ROLFE, B.

Murphy, Serjt., for the prisoner.—There are two acts of Parliament which bear upon this case, which were not adverted to at the trial. They are the stat. 1 & 2 Vict. c. 96, and 3 & 4 Vict. c. 111. The stat. 1 & 2 Vict. c. 96, (which passed in the year 1838) is intituled “An Act to amend until the end of the next Session of Parliament the Law relative to Legal Proceedings by certain Joint Stock Banking Companies against their own Members, and by such Members against the Companies.” This act enables the company, in the name of a public officer, nominated as is directed in the stat. 7 Geo. 4, c. 46, to proceed *civilly* against a member of the company as if he were not a member. The stat. 3 & 4 Vict. c. 111, is intituled “An Act to continue until the 31st day of August, 1842, and to extend the provisions of an Act of the 1st & 2nd Years of her present Majesty, relating to Legal Proceedings by certain Joint Stock Banking Companies against their own Members, and by such Members against the Companies;” and the preamble of this act recites, that “Whereas an

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act was passed in the 1st and 2nd years of the reign of her present Majesty, intituled 'An Act to *extend* until the end of the next Session of Parliament,' &c., setting out the title of the stat. 1 & 2 Vict. c. 96, but substituting the word "*extend*" for the word "*amend*;" and the preamble then recites that the "*said act*" had been continued till the 31st day of August, 1840, by an act of the then last session of Parliament, (2 & 3 Vict. c. 68); and the 2nd section of the stat. 3 & 4 Vict. c. 111, after reciting that "Whereas it is expedient to extend the provisions of the *said act* hereby continued as hereinafter stated," enacts "That if any person or persons being a member or members of any banking copartnership within the meaning of the said act, or of any other banking copartnership consisting of more than six persons, formed under or in pursuance of an act passed in the 3rd and 4th years of the reign of King William the Fourth, [the stat. 3 & 4 Will. 4, c. 98,] intituled 'An Act for giving to the Corporation of the Governor and Company of the Bank of England certain Privileges for a limited Period, under certain Conditions,' shall steal or embezzle any money, goods, effects, bills, notes, securities, or other property of or belonging to any such copartnership, or shall commit any fraud, forgery, crime, or offence against or with intent to injure or defraud any such copartnership, such member or members shall be liable to indictment, information, prosecution, or other proceeding in the name of any of the officers for the time being of any such copartnership, in whose name any action or suit might be lawfully brought against any member or members of any such copartnership for every such fraud, forgery, crime, or offence, and may thereupon be lawfully convicted, as if such person or persons had not been or was or were not a member or members of such copartnership; any law, usage, or custom to the contrary notwithstanding." Now, I submit, first, that although it might have been intended by the stat. 3 & 4 Vict. c. 111, to make a partner in a company who embezzled its money

liable to an indictment, yet that it has failed to do so, inasmuch as there is no such act of Parliament passed in the 1st & 2nd of Vict. as an act *intituled* an act to *extend*, &c., which is the act that the stat. 3 & 4 Vict. c. 111, proposes to continue. I submit, therefore, that the stat. 3 & 4 Vict. c. 111, has no operation on the stat. 1 & 2 Vict. c. 96, and as that statute expired in the year 1840, there is therefore no power of indicting a member of one of these copartnerships for embezzlement, as the indictment is required to be in the name of some officer in whose name an "action or suit might be lawfully brought against any member," which could not be done after the stat. 1 & 2 Vict. c. 96 had expired. I submit, secondly, that even supposing that the stat. 1 & 2 Vict. c. 96, notwithstanding the misrecital of its title, is to be treated as referred to and extended by the stat. 3 & 4 Vict. c. 111, yet the conviction in the present case cannot be sustained, because the offence of a partner against a company is made liable to indictment, not generally, but only in the name of an officer in whose name an action could be brought against a member of the company, such officer being by the stat. 1 & 2 Vict. c. 96, an officer nominated in the mode prescribed by the stat. 7 Geo. 4, c. 46. Strictly speaking, an indictment is not in the name of any person; but giving a reasonable construction to the statute, it must be understood to require that where the company is the party injured, and would otherwise be described as such, the indictment must give the name of some officer nominated under the stat. 7 Geo. 4, c. 46, s. 4. If that be so, those counts of the indictment which charge the prisoner with having embezzled or stolen the money of John Teather, public officer of the Carlisle and Cumberland *Banking Company*, require proof of John Teather's appointment as public officer of the "Carlisle and Cumberland *Banking Company*," which is not given. And with respect to those counts which do not describe John Teather as public officer, and do not

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name the banking company, I submit that even supposing an indictment would be sufficiently "in the name of a public officer," within the meaning of the stat. 3 & 4 Vict. c. 111, s. 2, if the offence were stated to be against him by *his name*, without describing his *office*, it would be still necessary that the person named should be a public officer, and that being such officer the statute makes his name equivalent to the names of all the partners, and consequently the counts charging the prisoner to have committed the offence against "John Teather and others," (which is the case with all those in which the bank is named), are to be understood as charging it to have been committed against *the company and others*, whereas the evidence is, that it was against the company alone.

The case was afterwards considered by the Judges, who held that the conviction was right.

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OXFORD SPRING CIRCUIT, 1842.

BEFORE MR. JUSTICE PATTESON AND MR. JUSTICE
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BERKSHIRE ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PATTESON.

PARDOW *v.* WEBB.

DEBT for work and labour, with a count upon an account stated.

Plea, *nunquam indebitatus*.

It was proved, on the part of the plaintiff, that an agreement had been entered into between the plaintiff and the defendant, that the plaintiff should make bricks for the defendant at 10s. per thousand, and the plaintiff claimed £25, which was the proper amount for the quantity made at 10s. per thousand.

It was proposed on the part of the defendant to shew that many of the bricks were so badly made as to be worthless.

Ludlow, Serjt., for the plaintiff.—I submit, that as this was a contract for work at a specified price, this evidence is not admissible unless the bricks had been repudiated by the defendant.

If A. employ B. to make bricks for him at a stipulated price per thousand, and B. do so, and some of the bricks be so badly made as to be good for nothing, A. will be entitled to make a deduction for those badly made bricks out of the stipulated price, and may make such deduction in an action brought by B. for the stipulated price; but if the bricks be badly made in a trifling degree, only so as merely to be less valuable than they

otherwise would have been, A., in an action for the stipulated price, will not be entitled to make any deduction on this account.

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PATTESON, J.—I think that the evidence is receivable.

The evidence was given.

PATTESON, J., (in summing up).—If any portion of these bricks was badly made and defective in only a trifling degree, so as only to make them less valuable, the plaintiff will be entitled to recover for the making at 10s. per thousand, as that was the stipulated price; but if you are satisfied that any portion of the bricks were so badly made as to be good for nothing, so that the defendant could derive *no* benefit from them, the defendant is at liberty to shew the extent of his loss, and if you are satisfied that this loss to him exceeded in amount the stipulated remuneration to the plaintiff, you ought to find for the defendant; and if you think that the amount of the loss thus occasioned to the defendant is less than the amount of the stipulated price, you should deduct the amount of the loss from the stipulated price, and find for the plaintiff for the residue.

Verdict for the plaintiff for 12*l.* 10*s.*

Ludlow, Serjt., and *Talbot*, for the plaintiff.

F. V. Lee, for the defendant.

[Attornies—*E. Vines*, and *Weedon*.]

GWYNNE v. SHARPE, Esq.

SLANDER.—The first count of the declaration stated, that, “before the committing by the defendant of the If in an action for slander, in which the declaration contain prefatory allegations, the defendant only plead not guilty, the plaintiff will not be allowed to go into any evidence as to the prefatory allegations, and all those allegations must be taken to be perfectly true, as the defendant has not denied them, which he might have done if he had meant to put the plaintiff to prove them.

grievances hereinafter mentioned, a certain box or desk of the plaintiff's, containing sundry valuable articles, amongst others a pearl brooch, [enumerating several articles of jewellery], the property of the plaintiff, had been and was feloniously stolen, taken, and carried away, by some person or persons, from the plaintiff's dwelling-house, situate within the borough of Windsor, in the county of Berks," and that the plaintiff, having reasonable cause to suspect that Maria Heaton was accessory to the felony, caused her to be charged and examined before the mayor and certain justices of Windsor, touching the commission of the aforesaid felony, and that upon such examination the plaintiff deposed that the said pearl brooch, &c., was feloniously stolen from her dwelling-house; and that defendant spoke certain slanderous words of the plaintiff, importing that no felony had been committed. The second count was for other words of nearly similar import. Plea—not guilty.

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Ludlow, Serjt., for the plaintiff, proposed to call witnesses to shew that the articles mentioned in the declaration had been stolen from the house of the plaintiff.

PATTESON, J.—I cannot allow it to be done. I have only to try the issues joined in this cause. There is no issue taken on the allegation that these articles were feloniously stolen.

The evidence was rejected (a).

PATTESON, J., (in summing up).—The statements which are admitted on the record, that is, all those allegations which are contained in the declaration, and not denied by the plea, must be taken to be perfectly true; and it is not only unnecessary to give evidence of the truth of them,

(a) We have been informed that anything for the attendance of the on the taxation of the plaintiff's witnesses whose evidence was rejected costs, the Master would not allow

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but such evidence cannot be allowed to be given, because the matters are admitted, and are not put in issue, which they might have been, if the defendant had chosen to put the plaintiff to the proof of the statements contained in them.

Verdict for the plaintiff.

Ludlow, Serjt., Carrington, and J. Jefferys Williams, for the plaintiff.

Talfourd, Serjt., and F. V. Lee, for the defendant.

[Attornies—*Martin, and Darvill.*]

Feb. 25th.

REGINA v. CAROLINE HEWETT.

A female servant being suspected of stealing money, her mistress on a Monday told her that she would forgive her if she told the truth. On the Tuesday she was taken before a magistrate, and was discharged, no one appearing against her. On the Wednesday the superintendent of police went with her mistress to the Bridewell, and told her in the presence of her

LARCENY.—The prisoner was indicted for stealing thirteen sovereigns and other money, the property of Sarah Cooper, her mistress.

It appeared that the money was stolen on the evening of Monday, the 14th of February, 1842, and the prisoner being suspected, Mrs. Cooper, on that evening, told the prisoner that she would forgive her if she told the truth. On the next day, Tuesday, the prisoner was taken before a magistrate, but Mrs. Cooper not appearing against her, she was discharged and placed under her brother's care. After that, the prisoner made a statement.

J. Jefferys Williams, for the prisoner, objected that this statement was inadmissible, on the ground that the im-

miss, that she "was not bound to say anything unless she liked, and that if she had anything to say her mistress would hear her;" but the superintendent (not knowing that her mistress had promised to forgive her) did not tell her that if she made a statement it might be given in evidence against her. The prisoner made a statement:—*Held*, that this statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement, but that if the mistress had not been then present, it might have been otherwise.

pression produced on the prisoner's mind, by Mrs. Cooper's promise of pardon the evening before, had not been removed.

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Mrs. Cooper, in answer to questions put by the learned Judge, said, that she did not tell the prisoner on the Tuesday that she would not forgive, nor that anything she said would be given in evidence against her.

PATTESON, J.—I think that her statement cannot be given in evidence.

Mr. Houlton, the superintendent of police at Reading, was called, and he stated, that on the Wednesday morning he was sent for to the Bridewell, where the prisoner was, and that he went there with Mrs. Cooper. Mr. Houlton stated, that he told the prisoner, in the presence of Mrs. Cooper, that she was not bound to say anything unless she liked, and that if she had any thing to say Mrs. Cooper would hear her. He further stated, that he did not know, at that time, that Mrs. Cooper had promised to forgive her if she would tell the truth, and that he did not tell the prisoner, that if she said anything it might be given in evidence against her. She then made a statement.

J. Jefferys Williams, for the prisoner, objected to this statement being received in evidence, and cited the case of *Regina v. Taylor* (a).

A. Wood, for the prosecution.—In the case of *Rex v. Nute* (b), the prisoner was charged with setting fire to an out-house, and her mistress told her if she would repent God would forgive her, but she concealed from her that she would not forgive her herself. She confessed, and the next day another person in her mistress's sight, though

(a) 8 C. & P. 733.

(b) Chitt. ed. of Burn's Just., tit. Evidence.

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out of hearing, told her that her mistress had said she had confessed, and drew from her a second confession. Lord *Eldon* allowed the confessions to be given in evidence, and the prisoner was convicted. Lord *Eldon* having left it to the jury to say whether the first confession was made under a hope of favour here, and the second, under the influence of the first, and the jury found that that was so. The twelve Judges held that these points were not for the jury; but that if Lord *Eldon* agreed with the jury, which he did, the confessions were receivable.

PATTERSON, J.—There the supposed inducement was that God would forgive her—here Mrs. Cooper says that *she* will forgive her. The nearest case to the present is that of *Isabella Meynell* (c). In that case the prisoner was charged with stealing hams, and a constable had said to the prisoner, in the presence of one of the prosecutors, “You had better tell all about it;” and she made a statement which was not given in evidence. In the afternoon of the same day, another of the prosecutors went to the house of the prisoner, and entered into conversation with her about the hams, when she repeated the confession she had made to the constable in the morning; but no promise or menace was on this occasion held out to her. Sir *G. A. Lewin*, for the prosecution, requested the learned Judge’s opinion, whether he was at liberty to make use of the latter confession. Mr. Justice *Taunton* said—“I am clearly of opinion that it is not receivable, it being impossible to say that it was not induced by the promise the constable made to her in the morning.” I think that the statement of the prisoner is not receivable in evidence. If Mrs. Cooper had not been present when the statement was made it might have been different; but I think that, as Mrs. Cooper was present, and the interval of time was only from the Monday to the Wednesday, the impression

produced by Mrs. Cooper's promise of forgiveness on the Monday evening, must be considered as still operating on the prisoner's mind.

The evidence was rejected.

Verdict—Guilty.

A. Wood, for the prosecution.

Carrington, and *J. Jefferys Williams*, for the prisoner.

[Attornies—*Slocombe*, and *Richards*.]

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(*Crown Side*.)

BEFORE MR. JUSTICE CRESSWELL.

REGINA v. BLOOMFIELD.

FALSE pretences.—The first count of the indictment stated that the defendant, on &c., at &c., “did unlawfully falsely pretend to one Charlotte, the wife of George Palmer, that he, the said Daniel Bloomfield, was Mister Hitchings, and that he was the same person that had cured Mistress Clarke, at the Oxford infirmary. By means of which said false pretence, he, the said Daniel Bloomfield, did then and there obtain from the said George Palmer, the husband of the said Charlotte Palmer, one piece of the current gold coin of this realm, called a sovereign, of the monies, goods, and chattels of the said George Palmer, * with intent then and there to cheat and defraud him, the said George Palmer, *of the same*; * whereas, in truth and in fact, &c. [negating the false pretences]. The second

A defendant was charged in the first count of an indictment with having falsely pretended that he was Mr. H., who had cured Mrs. C. at the Oxford infirmary, and thereby obtaining one sovereign, with intent to defraud G. P. “of the same.” The second count laid the intent to be to defraud G. P. “of the sum of 5s., parcel of the value of the

said last-mentioned piece of the current gold coin.” It was proved that the defendant made the pretence, and thereby induced the prosecutor to buy, at the expense of 5s., a bottle containing something which he said would cure the eye of the prosecutor's child. The prosecutor gave him a sovereign and received 15s. in change. It was further proved that the defendant was not Mr. H.

Held, that this was a false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 63, and that the intent was properly laid in the second count.

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count was exactly similar to the first count, except that instead of the words between the **, the following were inserted—"with intent to cheat and defraud him, the said George Palmer, of the sum of five shillings, parcel of the value of the said last-mentioned piece of the current gold coin." The third, fourth, and fifth counts alleged the pretence to have been made to the husband, and that a sovereign was obtained from him, with intent to defraud him of "*the same*;" and in the third count it was stated in a prefatory allegation, that, in the year, 1840, Elizabeth Clarke was a patient in the Oxford infirmary, and that she was attended by and was under the care of one George Hitchings, the said George Hitchings then being a surgeon.

Mrs. Palmer, the wife of the prosecutor, was called, she said—"On the 4th of February, the defendant came to our house, he said, 'I am a gentleman come from Oxford to give advice to poor people, for I understand the parish doctor is severe to the poor.' I asked him, 'Are you Mr. Hitchings?' and he replied, 'I am; yes, yes.' I then asked him if he was the same person that had cured Mrs. Clarke at the Oxford infirmary, and he replied, 'I am.' I had a child in my arms, the defendant looked at the child's eyes, and said that the child would lose them in less than a month, and he asked me if I would go to the expense of two bottles of stuff for the child, at 5s. 6d. a bottle, which would be 11s. I said, I could not afford it; he then asked if I would go to the expense of one bottle, which would be 5s. 6d. I said, 'If you think my child will lose its eye I will go to the expense of one.' The defendant asked for a bottle, which I gave him. I went up stairs, and on my return I saw something yellow in the bottle. My husband gave the defendant a sovereign, and the defendant gave him in change two crown pieces and two half-crowns, saying he would let us have the stuff for five shillings."

George Palmer, the prosecutor, stated, that Mrs. Clarke, who was now dead, was his grandmother, and that he would

not have given the defendant the sovereign, or have bought the stuff of him, if he had not believed that the defendant was Mr. Hitchings.

It was proved by the Rev. W. S. Bricknell, that he knew Mr. Hitchings, who was an eminent surgeon, and that the defendant was not Mr. Hitchings; and also, that he had given Mrs. Clarke a recommendation to the Oxford Infirmary, to be under the care of Mr. Hitchings. There was no evidence to prove that Mrs. Clarke was at the Oxford Infirmary, but it was proved by Mr. Bricknell, that she was absent from home soon after he gave her the recommendation.

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Tyrwhitt, for the defendant.—I submit that this prosecution cannot be sustained. I submit, first, that the first, third, fourth, and fifth counts are disproved. In those counts, it is alleged that the defendant obtained a sovereign, with intent to defraud George Palmer of "the same." Now, what he really obtained was, not a pound, but five shillings, and it is manifest he never could have intended to defraud George Palmer of "*the same*," which was a sovereign, as he gave fifteen shillings back, so that, at the very worst, he never could defraud George Palmer of more than five shillings. Secondly, I submit that the second count ought to have charged, that the defendant had obtained five shillings with intent to defraud George Palmer of the same.

CRESSWELL, J.—The defendant never obtained anything but a sovereign, and if the indictment had stated that the defendant obtained five pieces of the current silver coin of this realm called shillings, it would have been wrong.

Tyrwhitt.—I submit, thirdly, that this is not an obtaining by false pretences within the statute. The money was obtained by a sale of what the defendant called stuff.

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In the case of *Rex v. Codrington* (a), it was held, a false pretence made use of in the sale of some landed property was not within the statute; and here, the money was obtained, because the prosecutor and his wife thought that the child would be cured by the stuff that they bought of the defendant.

Carrington, for the prosecution.—I submit that the first objection is not sustainable. The first, third, fourth, and fifth counts state, that the defendant obtained a piece of gold coin, called a sovereign, with intent to defraud the prosecutor of "the same," that is, the piece of gold coin. Now, as I submit, he did not the less intend to defraud the prosecutor of the piece of gold coin, because he gives some silver in exchange for it. A person is not the less guilty of stealing a given article, because, when he takes it, he leaves some other article instead of it. And with respect to the last objection, it is important that the prosecutor states that he should not have parted with his money if he had not believed the defendant to be Mr. Hitchings (b).

CRESSWELL, J.—The only part of the pretence that is proved is, that the defendant said he was Mr. Hitchings. I am of opinion that the case must go to the jury.

Tyrwhitt, addressed the jury for the defendant.

CRESSWELL, J. (in summing up).—The questions for you to consider are these—Did the defendant falsely represent that he was Mr. Hitchings, and did he, by so falsely representing, obtain this money? If you are satisfied that he

(a) 1 C. & P. 661.

(b) In the case of *Rex v. Hill*, R. & R. C. C. 190, it was held that, on an indictment for obtaining money by false pretences, the

whole of the pretence charged need not be proved; proof of part of it, and that the money was obtained on that part, is sufficient.

did so, you ought to find him guilty. With respect to the intent to defraud, I do not think that it can be taken that the defendant intended to defraud the prosecutor of a sovereign, because he not only gave silver coin to the amount of fifteen shillings to the prosecutor, but it was all along a matter of bargain and arrangement that he should do so. It therefore appears to me that the allegation on the second count, that the defendant obtained a sovereign, with intent to defraud the prosecutor of five shillings parcel of the value, is the one which the evidence supports.

Verdict—Guilty, on the second count. Sentence—Six months' imprisonment.

Carrington, for the prosecution.

Tyrwhitt, for the defendant.

[Attornies—*W. Ormond*, and —.]

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REGINA v. MARIA RUSSELL.

ARSON.—The prisoner was indicted for maliciously setting fire to the house of Ann Wright, at Old Windsor.

On the part of the prosecution Miss Wright was called: she said—"The prisoner was in my service. Very early on the morning of the 4th of December I perceived smoke and got up; and on my going down stairs I found a small faggot lighted and burning on the boarded floor of the kitchen, about four feet from the hearthstone. I took up the burning wood and put it into the grate. A part of the boards of the kitchen floor was scorched black, but not burnt. The faggot was nearly consumed, but no part of the wood of the floor was consumed."

In a case of arson, it appeared that a small faggot was set on fire on the boarded floor of a room, and the faggot was nearly consumed, the boards of the floor were "scorched black, but not burnt," and no part of the wood of the floor was consumed:—*Held*, that this was not a sufficient burning to support an indictment for arson.

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CRESSWELL, J.—The case of *Regina v. Parker (a)* is the nearest to the present, but I think it is distinguishable.

Carrington, for the prisoner.—I submit that the wood of the floor being scorched is not sufficient to constitute this offence, as wood may be scorched without ever being actually on fire.

CRESSWELL, J.—I have conferred with my brother *Patteson*, and he concurs with me in thinking, that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all. The prisoner must be acquitted.

Verdict—Not guilty.

Secker, for the prosecution.

Carrington, for the prisoner.

[Attornies—*Secker*, and *Slocombe*.]

(a) 9 C. & P. 45. In that case red heat, but not in a blaze," and the wood of the floor was "charred this was held a sufficient burning in a trifling way, it had been at a to support an indictment for arson.

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WORCESTER ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE PATTERSON.

REGINA v. BROOKES and Three Others.

March 8th.

BREAKING into a warehouse.—The indictment charged that “ John Brookes, late of the parish of St. Peter the Great, in the county of Worcester, labourer, John Attwood, late of the same, labourer,” [naming all the prisoners], “ the warehouse of Henry Webb and another there situate, feloniously did break and enter, and 100 knives of the value of £10, of the goods and chattels of the said H. W. and another in the same warehouse, then there being found, then and there feloniously did steal, take, and carry away,” &c.

It appeared in evidence that the parish of St. Peter the Great is partly situate in the *county of Worcester*, and partly situate in the *county of the city of Worcester*.

Whitmore, for the prisoners.—I submit that the description of the parish in this indictment is insufficient, and that the locality of the premises being material to this charge, it must be proved as laid. According to the allegation contained in this indictment, the *whole* of the parish of St. Peter is situate in the county of Worcester; but according to the evidence a part only of this parish is so situate. The indictment should have stated in the usual manner, that the offence was committed “ in that part of the parish of St. Peter which is within the county of Worcester.”

An indictment for breaking into a warehouse and stealing goods, stated the offence to have been committed in “ the parish of St. Peter the Great, in the county of W.” It appeared that only part of the parish of St. Peter the Great was in the county of W.

Held, that the indictment could not be supported for the breaking into the warehouse, but that it was sufficient for the larceny, and that to be good as to the breaking, it should have charged the offence to have been committed “ in that part of the parish of St. Peter the Great, which lies within the county of W.”

PATTERSON, J.—I am of opinion that that is so, and that

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the prisoners must be acquitted of the breaking into the warehouse, but they may be convicted of the larceny (a).

Verdict—Guilty of larceny.

F. V. Lee, for the prosecution.

Whitmore, for the prisoners.

[Attornies—*Pullen*, and *Cresswell*.]

(a) In the case of *Rex v. Bullock*, R. & M. C. C. 324, n., and Car. Supp. 282, which was an indictment for breaking into a house and stealing goods, the house was laid to be in the parish of "Saint Botolph, Aldgate," and it was proved that the parish was "Saint Botolph without Aldgate." The prisoner was convicted of the larceny, and the twelve judges held the conviction right, as there was no proof that there was no such parish in the county as that named.

In the case of *Rex v. Perkins*, 4 C. & P. 363, it was held that if a parish be partly situated in the county of W., and partly in the county of S., it is sufficient, in an indictment for

larceny, to state the offence to have been committed "at the parish of H. in the county of W."

In the case of *Rex v. Woodward*, R. & M. C. C. 323, the prisoner was indicted for setting fire to a stack of beans at the parish of Norman-ton-on-the-Wold, in the county of Nottingham. There is no such parish as that stated, it being a hamlet maintaining its own poor; and the Judges held, "that the offence had nothing of locality in it, and that there being no such place in the county, it could only be taken advantage of by plea in abatement, and the conviction was affirmed."

REGINA v. JOHN BROOKES and Three Others.

In an indictment for burglary, it is sufficient to allege, that the burglary was committed at a place, naming it, e. g. "at Norton-juxta-Kempsey, in the county aforesaid," without stating the place to be a parish, vill, chapelry, or the like.

BURGLARY.—The indictment charged, that "John Brookes, late of the parish of Norton-juxta-Kempsey, in the county of Worcester, labourer, John Attwood, late of the same, labourer, [describing all the prisoners], on the 4th day of January, 1842, in the night of the same day, with force and arms, "at Norton-juxta-Kempsey aforesaid, in the county aforesaid, the dwelling-house of Thomas Hooke, there situate, feloniously and burglariously did break and enter," &c., (charging a burglary in the usual form, and the stealing of two guns and other articles).

Whitmore, for the prisoners.—I submit that this indictment, as to the burglary, is bad, because the place Norton-juxta-Kempsey, at which the offence is alleged to have been committed, is not described by some word importing some known division of the county, such as parish, vill, chapelry, or the like.

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PATTESON, J.—I think that the name of the place, Norton-juxta-Kempsey, is sufficient of itself, without calling it either a parish or a vill or any thing of that kind.

Verdict—Guilty (a).

F. V. Lee, for the prosecution.

Whitmore, for the prisoners.

[Attornies—*Rea*, and *Cresswell*.]

(a) In the case of *Rea v. Napper*, R. & M. C. C. 44, which was an indictment for larceny in a dwelling-house, the indictment charged that the prisoner, on &c., “at *Liverpool*, in the county aforesaid,” one coat, of the value of 40s., of the goods and chattels of D. J., “in the dwelling-house of W. T., then and there being, then and there did feloniously steal,” &c. The doubt was, whether it should not have been stated “in the dwelling-house of W. T. there situate,” but the Judges “held that the indictment shewed sufficiently that the house was situate at *Liverpool*, and that the conviction therefore was proper.”

REGINA v. TIPPIN.

March 7th.

LARCENY.—The prisoner was indicted for stealing a knife and other articles, which were alleged in the first count of the indictment to be the property of Richard Samuel Kington; in the second count they were alleged to be the property of Henry Lord Bishop of Worcester;

A knife was stolen from the pocket of A., as his dead body lay in a road at S., in the diocese of W. The last place of abode of A. was at T., in

the diocese of G., but A.'s father stated that he believed his son had left T. to come to live with him, but did not know whether his son had given up his lodgings at T. :—*Held*, that this was sufficient proof to support a count for larceny, laying the property on the Lord Bishop of W.

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and in the third to be the property of Thomas Kington, the father of Richard Samuel Kington.

It appeared that Richard Samuel Kington had been in the employ of an ironmonger at Tewkesbury, which is in the diocese of Gloucester, and that on the evening of the 18th of December he left that place with the knife in his possession. It further appeared, that on the morning of the 19th December he was found dead on the turnpike-road leading from Tewkesbury to Worcester, at that part of the road which is situate in the parish of Seven Stoke, which is in the diocese of Worcester. It appeared that the last place of residence of Richard Samuel Kington was at Tewkesbury, in the diocese of Gloucester; but it was stated by the father of the deceased, that he believed that the deceased had left Tewkesbury with a view of coming to live with him, and he did not know of his own knowledge whether or not the deceased had given up his lodgings at Tewkesbury.

PATTERSON, J., (in summing up), desired the jury to inform him (in the event of their coming to the conclusion that the prisoner was guilty) whether they found that the property was taken from the deceased Richard Samuel Kington before or after his death.

The jury found the prisoner guilty, and that the property was taken from the deceased after his death.

PATTERSON, J.—I am of opinion that the property is rightly laid in the Bishop of Worcester (a).

(a) Lord Chief Baron Comyns lays down (Com. Dig. tit. Administrator, (B. 5)) that, "if an intestate has not bona notabilia, administration shall be granted by the bishop of the diocese where he dies;" and in the case of *Hilliard*

v. Cox, 1 Salk. 37, it was laid down by the Court of King's Bench, that, "if a man have two houses in several dioceses, and lives most at one, but sometimes goes to the other, and being there for a day or two dies, administration of his personal

F. V. Lee and *W. A. Hill*, for the prosecution.

[Attornies for the Prosecution—*Bird*, and *Holland*.

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estate shall be granted by the Bishop of this diocese, for he was commorant there, and not there as a traveller;" and it appears from

another report of this case in 1 Ld. Raym. 562, that this judgment was delivered by Lord *Holt*.



REGINA v. JOSEPH HANDLEY.

March 7th.

LARCENY.—The prisoner was indicted for having on the 7th of February, 1842, feloniously stolen thirty bushels of barley, the property of John Devey, his master.

On the part of the prosecution, Mr. John Devey, jun., was called; he said, "On the 7th of February last, the prisoner was in the employ of my father as waggoner. I had missed considerable quantities of barley. I searched the tallet of the stable, and there found under some clover seed and fodder eight bags of barley, amounting to thirty bushels. Upon my taxing the prisoner with it, he said that he had taken the barley for the purpose of giving it to the horses.

A servant clandestinely taking his master's corn to give to his master's horses, is guilty of a larceny, and this point having been so recently decided by a large majority of the twelve judges, the judge at the trial would not again reserve the point.

Beadon, for the prisoner.—I submit, that there is no case to go to the jury, on the ground that the prisoner had no intention of appropriating any part of this barley to his own use. I am aware, that, in the case of *Rex v. Morfit and others* (a), it was laid down by the Judges that a servant's

(a) R. & R. C. C. 307. In that case the prisoners were indicted for stealing beans, the property of their master, and tried before Mr. Justice *Abbott*. It was found by the jury that the prisoners took the beans intending to give them to their master's horses. Mr. Justice

Bayley had, in a similar case, directed an acquittal; but Mr. Justice *Abbott* being informed that the late Mr. Justice *Heath* had, on several occasions, held this to be larceny, and that Lord Chief Baron *Macdonald* had told the grand jury at Maidstone that this was a larceny,

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improperly taking corn to feed the horses of his employer was a larceny, but it may be a question whether it would be advisable in all cases to act on that decision.

PATTESON, J.—Even so far as regards the question, whether the prisoner meant to appropriate the barley to his own use, there is a case for the jury.

Beadon addressed the jury on behalf of the prisoner, and contended that the prisoner intended to give the corn to his employer's horses to make them look better.

PATTESON, J., (in summing up).—The case referred to by the learned counsel is similar in all its bearings to the present; and in respect of it a considerable majority of the Judges decided, that a servant clandestinely taking corn for the purpose of feeding his master's horses was guilty of a larceny. However, as there should be a wide difference in the punishment, I wish you to say whether the prisoner took the corn for his own use and benefit, or to give to his master's horses.

Verdict—Guilty; the foreman of the jury adding, "We think that he took the corn with intent to give it to his master's horses."

PATTESON, J.—I will confer with my learned brother on this case.

Whitmore, for the prosecution.

Beadon, for the prisoner.

[Attornies—*Bird & Saunders*, and *Boycot*.]

his Lordship reserved the case for the consideration of the Judges, and the point having been considered by eleven of the Judges, eight of their Lordships held that this was felony, but Barons *Graham* and *Wood*, and Mr. Justice *Dallas*, thought this not a felony.

PATTESON, J.—I have conferred with Mr. Justice *Cresswell*, and we both think that the case of *Rex v. Morfit* is too recently decided by a large majority of the Judges for me to take the opinion of the Judges again upon the point.

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The prisoner was sentenced to be imprisoned for one month.

STAFFORD ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE PATTESON.

DOE on the demise of *STANWAY v. ROCK*.

EJECTMENT to recover a piece of ground, situate at the parish of Wednesbury.

After the jury had been sworn, and after *Meteyard*, for the plaintiff, had opened the pleadings, it was discovered by *Patteson, J.*, that in the *Nisi Prius* record the name of the real defendant had not been substituted for that of *Richard Roe*.

The proviso as to cestui que trusts contained in sect. 7 of the stat. 3 & 4 Will. 4, c. 27, applies only to cases of declared and express trusts, and not to the case of a person holding

under an agreement to purchase.

If a person who has agreed to purchase real property be let into possession, he is a tenant at will, and such tenancy at will is determined by his death; and if after his death his widow, who is also devisee of his real estate, continue in possession, this is not a continuance of his tenancy at will, so as to prevent the operation of that statute, and therefore in such a case, where the person thus let into possession died more than twenty years before ejectment brought by the representatives of the intended vendor, it was held that it was too late, unless a new tenancy could be shewn in the widow, the first year of whose tenancy was within twenty years before the ejectment; and if such new tenancy were shewn, no demand of possession would be necessary, as such new tenancy would be determined by the death of the widow, which occurred before the ejectment.

Where, after the jury are sworn in an ejectment case, it is discovered that in the *Nisi Prius* record, the name of the real defendant has not been substituted for that of *Richard Roe*, but the consent rule and jury process are right, the record ought in strictness to be withdrawn and amended on summons, and then re-entered; but by consent the Judge will allow the amendment without withdrawing the record.

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In the consent rule and jury process the name of the real defendant was correctly inserted.

Talfourd, Serjt., for the plaintiff, asked to have the mistake rectified by an amendment.

PATTERSON, J.—As the real defendant is not before this Court, the record ought in strictness to be withdrawn, and a summons taken out for the parties to appear before me, in order that the declaration should be amended by inserting the name of the real defendant, and the cause re-entered; but to save time I will allow the amendment to be made in Court, if the other side will consent.

Ludlow, Serjt., for the defendant, consented.

The amendment was made, and the jury re-sworn.

It was opened by *Talfourd*, Serjt., for the plaintiff, that the ground in question had belonged to Sir Joseph Scott and Mr. Foley, who were lords of the manor of Wednesbury, and under whom the lessor of the plaintiff claimed as a vendee; and that they having agreed, in the year 1816, to sell the property to a person named Richard Woolrich, an agreement had been entered into between Woolrich and Thomas Butler for the sale of it to the latter; but that purchase never having been completed, Butler gave up the possession to Woolrich, who died in the year 1822, when his widow came into possession, and she died in the year 1837. The present ejectment was brought on the 8th of January, 1842; and he submitted that it was not too late, as this case came within the proviso as to cestui que trusts contained in the seventh section of the stat. 3 & 4 Will. 4, c. 27 (a).

(a) By the stat. 3 & 4 Will. 4, c. 27, s. 7, it is enacted, "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of

He also cited Sir Edward Sugden's Vendors and Purchasers (b).

It appeared that about forty years ago the ground in question (upon which a house then stood) was held of the lords of the manor, Sir J. Scott and Mr. Foley; and that about the year 1816, Richard Woolrich was in possession of it; and that on the 1st of January, 1817, Woolrich entered into the following agreement with Thomas Butler:—

"An agreement made the 1st day of January, 1817, between Richard Woolrich, of Wednesbury, in the County of Stafford, Farmer, of the one part, and Thomas Butler, of Darlaston, in the same County, Farmer, of the other part.

"Whereas the said Richard Woolrich having agreed to purchase a small plot or parcel of land in Wednesbury aforesaid, and has erected shambles thereon, from Sir S. Scott, Bart., and Edward Thomas Foley, Esq., for the sum of £30: And whereas the said Richard Woolrich having got no conveyance or title to the said land, and being unable to pay the money or complete the said purchase, has agreed to sell and dispose of such agreement, and the premises aforesaid, to the said Thomas Butler, for the price or sum of £100: therefore the said Richard Woolrich doth hereby agree to sell and transfer the said agreement of purchase, and the said shambles or buildings thereon, to the said Thomas Butler, his heirs and assigns; and the said Richard Woolrich doth hereby acknowledge to have had and received the said sum of £100 of and from the said Thomas Butler for the said purchase; and that he the

the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such

tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

(b) Chap. XI., sect. V., div. IV.

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said Richard Woolrich shall and will make or join in a conveyance, at the expense of the said Thomas Butler, accordingly. As witness the hands of the parties, the day and year aforesaid.

“ RICHARD WOOLRICH.

“ Witness,

“ THOMAS X BUTLER,
 his mark.”

“ R. JESSON.

It further appeared, that Butler gave up possession to Woolrich, who was buried on the 8th of January, 1822, (the present ejectment being brought on the 8th of January, 1842, and more than twenty years after the death of Woolrich). It was proved that Mrs. Woolrich (who was the devisee of her husband's real estate) died in the year 1837; but the only evidence to shew that Mrs. Woolrich ever was the tenant of the lords of the manor, was that of a person named Growcock, who said, “ I knew Mr. Weddell, the agent of Scott and Foley; I went to ask Mrs. Woolrich for rent of the land the shambles were on: she said that she or one of the family would be over in half an hour, at the rent-house (the Talbot): it was close at hand. I went back to Mr. Weddell, and told him that she would come in half an hour, or one of the family.”

Ludlow, Serjt., for the defendant.—I submit that this ejectment cannot be maintained. There is no evidence of any rent paid within twenty years; and if Woolrich was a tenant at will, there should have been a demand of possession. It is quite clear that the proviso in the seventh section of the stat. 3 & 4 Will. 4, c. 27, applies to cases of trusts of quite a different kind.

PATERSON, J.—I have conferred with my brother *Cresswell*, and he agrees with me in thinking that the proviso contained in the seventh section of the stat. 3 & 4 Will. 4, c. 27, does not apply to this case. A person let in under a purchase is a tenant at will; and this proviso applies only to declared and express trusts, and not to trusts in equity

of this kind. That reduces it to the question, whether the widow of Richard Woolrich became tenant at will under a new taking; because, if the only tenancy at will was the husband's, that was determined more than twenty years ago, as it is quite clear that that tenancy at will was determined by the death of the husband. The only question is, whether there was a new tenancy; for if there was, the present ejectment is brought within twenty years after the first year of that tenancy. With regard to a demand of possession, none was necessary, because we have it that the new tenancy, if such ever existed, was determined by the death of the widow, which occurred before the 8th of January, 1842. The jury will have to say whether there was a new tenancy at will by the widow after the death of the husband; and of that the evidence is very slight. No rent ever paid—no act by which she acknowledges herself to be tenant. Nevertheless, as there is some evidence, I must leave it to the jury.

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Verdict for the defendant.

Talfourd, Serjt., *R. V. Richards*, and *Meteyard*, for the plaintiff.

Ludlow, Serjt., and *John Gray*, for the defendant.

[Attornies—*Barnett*, and *Holland*.]

In the ensuing term, *Talfourd*, Serjt., applied to the Court of Common Pleas for a new trial, but the Court refused a rule.

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PERRY and Others v. SMITH.

In a declaration in an action for not completing a purchase of copyhold, it was alleged, that on the 27th of June the plaintiffs "were ready and willing, at the office of the steward of the said manor of N., to receive the residue of the said purchase-money, and then and there to surrender." This was denied by the plea:—*Held*, that this allegation was proved by showing that the plaintiffs were ready and willing to have gone to the steward's office on that day to surrender, but did not do so, because on the 25th the defendant told the solicitor, who was concerned for all parties, that he was not ready to complete the purchase on the 27th.

ASSUMPSIT.—The first count of the declaration stated, that, by an agreement in writing, reciting that the defendant had purchased certain copyhold lands at public auction of the plaintiffs, at the sum of £300, the plaintiffs, in consideration of £30, paid to them at or before the signing of the agreement, and also in consideration of £270 to be paid to the plaintiffs on the 27th of June then next, did agree that they the plaintiffs would make a good title, and deliver an abstract on the 1st of April then next; "and on payment of the remainder of the said sum of £300 on the said 27th day of June, at the office of the steward of the said manor of Newcastle-under-Lyme, should and would, with all necessary parties, surrender or join in surrendering the said lands" to the defendant: that the defendant agreed to pay the remainder of the said £300 to the plaintiffs on the said 27th day of June on having such surrender made (at which time the defendant was to enter into possession), and also to be at the expense of preparing such surrender: and that it was further agreed, that in case completion of the purchase should be delayed on the part of the defendant beyond the time appointed for that purpose, that the defendant should pay interest from the 27th of June. This count contained an allegation of mutual promises, and a general averment of performance by the plaintiffs of all that was to be by them performed; and also averments, that on the 1st of April the plaintiffs made

If a plaintiff in his declaration aver the performance of a condition precedent, and the defendant deny this by his plea, and the plaintiff were to reply matter of excuse for not performing the condition, this would be a departure.

A purchaser had agreed to complete a purchase on the 27th of June. The solicitor, who was concerned for all parties, called on him on the 25th of June, and asked him if he would be ready to complete on the 27th:—*Held*, that what the purchaser said in answer, was not a privileged communication.

A purchaser agreed, that if the completion of the purchase "should be delayed on his part" beyond the 27th of June, he would pay interest. The vendor and his trustee were willing to complete on that day, but the purchaser was not prepared; but on the 28th of November, when the purchaser was ready, the vendor's trustee would not join:—*Held*, that the purchaser was liable to interest only from the 27th of June to the 28th of November.

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out a good title, and delivered an abstract; and that on the 27th of June the plaintiffs "were ready and willing, at the office of the steward of the said manor of Newcastle-under-Lyme, to receive the residue of the said purchase-money, and *then and there*, with all necessary parties, to surrender and cause to be surrendered the said lands," &c., to the defendant; and that the defendant entered into possession on the 27th of June. Breach, that the defendant did not, on or before the 27th of June, prepare a surrender, nor did he then pay the remainder of the purchase-money; and that, although the completion of the purchase had been delayed by the defendant, he had not paid any interest. Second count, upon an account stated. Pleas—first, non assumpsit. Second, that the plaintiffs, on the said 27th day of June, were not ready and willing to surrender, or cause to be surrendered, the said lands, &c., in manner and form as in the declaration is alleged.

The agreement was put in. It was to the effect stated in the declaration.

On the part of the plaintiffs, Mr. Stevenson, the attorney for the plaintiffs, was called:—He stated that he was employed by the defendant to draw the surrender, and had also acted for the plaintiffs respecting the sale; and that the defendant did not pay the plaintiffs £270 on the 27th of June. In his cross-examination he stated, that the plaintiffs were not at the steward's office on that day; but on his re-examination he said, that on the 25th of June he had called on the defendant to ascertain if he would be ready to complete the purchase on the 27th.

W. J. Alexander, for the defendant.—As Mr. Stevenson has stated that he was at that time employed by the defendant to prepare the surrender, I apprehend that he ought not to state what he was told by the defendant, who was his client, as it was a privileged communication.

PATTERSON, J.—I think that the evidence is receivable.

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Mr. Stevenson stated, that, on the 25th of June, the defendant told him that he should not be ready by the 27th of June, and wished the matter to be postponed till the following court-day; and that in consequence of this he (Mr. S.) did not prepare the surrender, which, but for this, he should have prepared, and the plaintiffs would have surrendered the property. It further appeared, that after some more delays, the parties met at the steward's office on the 28th of November, when one of the trustees refused to join in the surrender, although he had been ready to do so on the 27th of June.

W. J. Alexander.—I submit that the second issue is not proved. To prove that issue on the part of the plaintiffs, it should have been shewn that the plaintiffs were at the steward's office on the 27th of June; and if they meant to have relied on any excuse, they should have stated it in their declaration, or have replied it.

PATTERSON, J.—It could not have been replied, as that would have been a departure.

Greaves and Whitmore, for the plaintiffs.—The defendant was bound by his agreement to be at the steward's office to pay the £270; and if he did not go there, the plaintiffs were not bound to go there to surrender. But even assuming that the plaintiffs were bound to be there, it is not competent for the defendant to say that they were not there. When a person has agreed to do an act, and he is prevented by the other party from doing the act, it is just the same as if he had done it, and it is not open to the other party to say, that the act which he has prevented has not been performed. It is laid down in Mr. Chitty's work on contracts (a), that a readiness and offer to fulfil a condition precedent by a plaintiff, and the discharge or

hindrance of its performance by the defendant, are in law equivalent to the completion of the condition precedent. Suppose the plaintiffs had been actually going to the office of the steward, and had been met by the defendant, who had told them they need not go, as he was not prepared to pay the money, it is clear that that would be equivalent to being at the steward's office ready to surrender; and that state of things is not distinguishable from the present, as here the defendant prevented the plaintiffs from going to the steward's office, by not preparing the surrender.

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W. J. Alexander.—The plaintiffs, in their declaration, ought to have stated the excuse instead of stating the performance of the condition.

PATTESON, J.—I think the issue is not on the fact of the plaintiffs being at the steward's office, but on the readiness of the plaintiffs to surrender. The witness has proved that, although the plaintiffs were not at the steward's office ready to surrender, that was because the defendant was not ready to pay the money. I interpret the issue not to be, that the plaintiffs were at the steward's office, but that they were ready to go there. I think also that the verdict ought to be for the plaintiff for £270, the remainder of the purchase-money and interest, from the 27th of June to the 28th of November; but as there was on that day a refusal to surrender, the defendant is not liable to pay interest after that period.

Verdict for the plaintiff for £270, and interest
from the 27th of June to the 28th of
November.

Greaves and Whitmore, for the plaintiffs.

W. J. Alexander, for the defendant.

[Attornies—*R. Stevenson, jun.*, and *Taylor*.]

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In the ensuing term, *W. J. Alexander* applied to the Court of Exchequer for a new trial, on the ground that what the defendant said to Mr. Stevenson on the 25th of June was a privileged communication; but the Court refused a rule, and Baron *Parke* said—"If the party employs an attorney who is also employed on the other side, the privilege is confined to such communications as are clearly made to him in the character of his own attorney. It is plain this was not but in his adverse character of attorney for the vendors." And Baron *Alderson* said—"It is clear that the communication made to this witness was made to him in his character of attorney for the vendors, on whose part he was applying for payment. If Mr. *Alexander's* argument were right, the effect would be, that wherever an attorney is employed by both parties, no communications made by him could be admitted in evidence, because they must all be made through the common attorney (b).

(b) In the case of *Gillard v. Bates*, 9 Law J. New Ser. Exch. 171, which was an action for work and labour, in suing out an execution against a person named Clarke, the defence was, that the plaintiff, who was an attorney, had been employed by a person named Bendle, and not by the defendant, and it was held that the plaintiff's agent, who was an attorney, might be asked whether the plaintiff on introducing Bendle to him, had not stated that he (the plaintiff) had

been employed by Bendle to sue out execution against Clarke, and that this was not a privileged communication; and in giving judgment the Court said, "The privilege does not attach to every thing that a client says to his attorney; the test is, whether the communication is necessary for the purpose of carrying on the action. If it is necessary, it becomes privileged." See the case of *Regina v. Avery*, 8 C. & P. 696.

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REGINA v. BOWLER.

INDICTMENT, on the 58th section of the Reform Act, 2 & 3 Will. 4, c. 45, for giving a false answer at the time of voting for members of Parliament for the borough of Stoke-upon-Trent, at the general election in the year 1841.

The indictment, which consisted only of one count, was in the following form:—

“The jurors, &c., present, that heretofore, to wit, on the 30th day of June, 1841, at a certain election for a member to serve in the Commons’ House of Parliament of and for the United Kingdom of Great Britain and Ireland for the borough of Stoke-upon-Trent, in the county of Stafford, to wit, at the said borough of S., in the same county, Joseph Bowler, late of &c., then and there appeared as a voter at the time of polling at the said election, and then and there tendered his vote as such voter, and that John Ford Hyatt, gentleman, then and there duly appointed deputy returning officer by and for John Cary, Esq., which said J. C., Esq., was then and there the returning officer at the said election for the said borough, the said J. F. H. duly appointed deputy as aforesaid, did then and there, at the time of the said J. B. so tendering his vote as aforesaid, the said J. F. H., so appointed deputy for such returning officer as aforesaid, having competent power and authority so to do, put to the said J. B., he the said J. F. H. as such deputy returning officer as aforesaid, being thereunto required on behalf of William Taylor Copeland, Esq., and Francis Dudley Ryder, Esq., who were then and there candidates at the said election, the following question, that is to say, Have you the same qualification for which your name was originally inserted in the register of voters now in force for

If A., who is registered as an elector for a borough as a £10 householder, gives up the house in respect of which he is registered, and takes another of superior value within the same borough after the registration and before the election, he loses his vote, and if before and at the time of the election a new tenant has taken possession of the house that A. has left, and is paying rent for it, the fact that a few articles of A.’s furniture remain in the house, and that A. retains one of the two keys of it, will make no difference.

Seemle, that an indictment against a voter for giving a false answer at the poll, which states, that at a certain election for a member of Parliament for the borough of S., the defendant appeared as a voter and tendered his vote as such, and that he

gave a false answer, that he had the same qualification for which he was put on the register, whereas in truth he had not, is bad, because it states all the matters by way of recital, and because it neither states the writ nor the precept for holding the election, nor that the defendant’s name was ever on the register.

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the borough of Stoke-upon-Trent, namely, a house in Glebe-street," meaning a house in Glebe-street in the said borough; to which question the said J. B. then and there unlawfully and wilfully did falsely answer "Yea," whereas in truth and in fact the said J. B. had not then and there the same qualification for which his name was originally inserted in the register of voters then in force for the said borough, to wit, a house in Glebe-street; but on the contrary thereof, the said J. B. had at the time of the said election and long before given up, quitted, and relinquished possession of the said house so situated in Glebe-street as aforesaid, in the borough aforesaid, which theretofore qualified him to be put on the register of voters, and for which his name was theretofore originally inserted in the register of voters then, to wit, at the time of the said election in force for the said borough of Stoke-upon-Trent, and ceased and discontinued to occupy the same and every or any part thereof, against the form of the statute in such case made and provided, and against the peace, &c. (a).

Talfourd, Serjt., for the defendant.—Before the case is gone into upon the facts, I would submit that this indictment is bad, because it states all the matters contained in it by way of recital and not as express allegations. It states, that at a certain election for a member of Parliament for Stoke-upon-Trent, the defendant appeared as a voter and tendered his vote as such, and that he gave an answer that he had the same qualification for which he was put on the register, namely, a house in Glebe-street. There is no statement of any writ or precept for holding the election, and for aught that appears, it might have been a mock election, like that represented in Mr. Haydon's celebrated picture, or an election held without lawful authority like that at which some years ago Sir Charles Wolseley and Mr. Edmonds were elected representatives

(a) This indictment had been removed by certiorari, and was tried at Nisi Prius.

for Birmingham, and for which Mr. Edmonds and others were afterwards imprisoned (b). Neither is it stated affirmatively that the defendant ever was on the register for a house in Glebe-street.

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Godson, for the prosecution.—The indictment is in the same form as that in the case of *Regina v. Dodsworth* (c), in which Sir *W. Follett* was the leading counsel for the defendant, and there no such objection was taken.

PATTERSON, J.—That case went off upon other points. I think, Mr. Godson, that, subject to any observations you may make, the objections to this indictment are formidable, but I shall let them remain for the decision of the Court of Queen's Bench (d).

On the part of the prosecution, examined copies of the writ and the precept for holding the election were put in, and also the list of voters signed by the revising barristers, and also the fair copy of it made by the returning officer, which by sect. 54 of the Reform Act, 2 & 3 Will. 4, c. 25, is declared to be the register.

It was also proved, that the election took place on the 80th of June, 1841, that Alderman Copeland, Mr. Ricardo, and Mr. Ryder were the candidates.

It was proved by Mr. Hyatt that he was one of the deputy returning officers at this election, and that Mr. Stevenson, on the behalf of Alderman Copeland and Mr. Ryder, desired him to put the third question to the defendant, which he did in the following form—"Have you the same qualification for which your name was originally inserted in the register of voters now in force for the borough of Stoke-upon-Trent, namely, a house in Glebe-street?" and that the defendant then answered "Yes," or "I have," and then voted a plumper for Mr. Ricardo. It was proved, that in the morning of the election the de-

(b) T. T. 1821.

(c) 8 C. & P. 218.

(d) See the case of *Regina v. Ellis*, post, p. 561.

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defendant was served with a printed notice, which stated that he had no right to vote, because he had left the house for which he was registered, and was liable to be prosecuted if he did vote.

It was further proved by Mr. Williamson, that, in June, 1841, he had taken the house in Glebe-street for which the defendant was registered, and that he had paid rent from the 24th of June, and that the defendant had left off sleeping there from the autumn of 1840, when he went to keep the Vine Inn, which was also within the borough of Stoke-upon-Trent, and was a house of greater value than that for which he was registered. This witness also stated, that until the time of and after the election, the defendant still retained one of the keys of the house in Glebe-street, of which there were two; but that after the 24th of June there was nothing belonging to the defendant at that house except a grate, a window-blind, some shelves, and the knocker on the door.

Talfourd, Serjt., for the defendant.—I submit that the defendant had fair ground for supposing that he still had such an interest in the house in Glebe-street as entitled him to vote in respect of it; but even if that were not so, he might fairly suppose that he had the same qualification if he had a house in the borough of equal or superior value. I will admit that the law is otherwise, but even that was by no means settled till certain decisions had taken place on the subject, which an innkeeper at Stoke-upon-Trent could know nothing about; and with respect to the notice, it could hardly be expected that a voter would attend to a notice given to him by his opponents at an election telling him not to vote, more especially when the defendant knew that he still retained the key of the house which he had quitted, and had furniture there, which in all probability was not known to the parties giving the notice.

PATTESON, J., (in summing up).—The question in this

case is, whether the defendant wilfully made a false answer to the question put to him as to his having the same qualification to vote for which his name was on the register. That his answer was a false answer, both in law and fact, is, I think, made out; but it is still possible that the defendant might have thought otherwise, as persons might construe "the same qualification" to mean one of the same nature, because a person changing his qualification before the registration might, by the 28th section of the Reform Act, claim to be registered, and persons might consider that it would be the same if they changed their qualifications after the registration, but that is not so, for to entitle the party to vote, he must have the *same premises* for which he was registered. It has been truly stated, that a man who was not a lawyer might not know that, and before you can convict the defendant on this indictment you must be satisfied that he gave this false answer "wilfully." It is clearly shewn that the defendant had quitted his house in Glebe-street and gone to the Vine Inn, which was of greater value; but the defendant could not truly say that he kept on the occupation of the house in Glebe-street, as Mr. Williamson had been there as tenant from the 24th of June; and the fact of the defendant keeping the key and having a grate and other articles there, was of no consequence whatever, as they were not there at all in respect of the defendant's possession of the house. Still it does not follow that the defendant made this answer wilfully; however, to fix him with knowledge that he had no vote, evidence has been given that just before he voted he was served with a notice, which stated that he had no vote. Now it might be, that the opposite party telling a man that he had no vote was just the way to make him act on any notion of his own that he had; still it drew his attention to the subject. Whether the defendant's vote was of any consequence in the election is wholly immaterial. The question is this, Did the defendant wilfully make a false answer, or did he really

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believe that he had the same qualification? It might have been that the defendant supposed that he had such a possession of the house in Glebe-street as would allow him to retain his vote, or he might think that the "same qualification" meant one of equal value. In either of these cases the defendant ought to be acquitted, but if you think the answer was wilfully false, you ought to find him guilty.

The special jury found the defendant Not guilty. The foreman adding, "We think that he acted very incautiously in voting."

Godson and *Whitmore*, for the prosecution.

Talfourd, Serjt., *F. V. Lee*, and *Beadon*, for the defendant.

[Attornies—*Stevenson*, and *Young*.]

REGINA v. ELLIS.

A voter in a borough, who is registered as a £10 householder, in respect of a house in "E. place," loses his vote, if after the registration and be-

INDICTMENT on the 58th section of the Reform Act, 2 & 3 Will. 4, c. 45, against the defendant, for giving a false answer at the time of voting for members of parliament for the borough of Stoke-upon-Trent, at the general election in the year 1841, by stating that he had the same qualification for which he was registered.

The indictment was in precisely the same form as in the last case (a). before the election, he removes to another house of equal value in E. place, although the house to which he removes is in every respect within the description contained in the register.

The "same qualification" in the 58th section of the Reform Act, 2 & 3 Will. 4, c. 45, means the same identical property.

In a register of borough voters, the word "Penkhull," which denoted a portion of the borough, was put at the head of several names, including that of the defendant, who was on the register in respect of a house in E. place:—*Held*, that if there was no other E. place in the borough, it was not necessary for the deputy returning officer, in putting the third question under the Reform Act, to add the word "Penkhull" as part of the description.

The word "wilfully," in an indictment on the 58th sect. of the Reform Act, 2 & 3 Will. 4, c. 45, for giving a false answer at the poll, should be construed in the same way as in an indictment for perjury, and be supported by the same sort of evidence.

A defendant in an indictment cannot, after plea, take advantage of any defect which is aided after verdict by the 21st section of the stat. 7 Geo. 4, c. 64; the only mode of taking advantage of such defects being by demurrer.

(a) See the case of *Regina v. Bowler*, ante, p. 559.

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PATTERSON, J.—The indictment here is open to all the same objections as the indictment in the last case; but it may be worthy of consideration whether the defects may not be aided by the 21st section of the stat. 7 Geo. 4, c. 64, which enacts, “that where the offence charged has been created by any statute or subjected to a greater degree of punishment by any statute, the indictment or information shall, *after verdict*, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.” Now, a party who has not demurred cannot after plea take any objection to any matter on the record which is aided by verdict, under this enactment (*b*).

Talfourd, Serjt., for the defendant.—This indictment does not follow the words of the statute which creates the offence.

PATTERSON, J.—You can make your objections hereafter in the Court of Queen’s Bench, if it should become necessary (*c*).

On the part of the prosecution examined copies of the writ and precept for holding the election were put in, and also the list of voters, and the book which was the register of voters. In the latter, a number of names of voters, including that of the defendant, were put under a heading which consisted of the name “Penkhull,” and other voters were put under the headings “Shelton,” “Hanley,” and “Lane End.”

It was proved by Mr. Hyatt, the deputy returning officer, that he put the third question to the defendant, in the following form—“Have you the same qualification for which your name was originally inserted in the register of voters now in force for the borough of Stoke-upon-Trent, namely, a house in Eldon-place?” to which the defendant answered in the affirmative. In his cross-examination, Mr. Hyatt stated, that in asking the question he did not say “namely, in Eldon-place, Penkhull,” and he further stated, that Penkhull was a place in the borough of Stoke-upon-Trent, which comprised several streets, besides Eldon-place, and that Shelton, Hanley, and Lane End, were also places in the borough, each of which consisted of several streets, and that there was no place in the borough called Eldon-place, except that in which the house in respect of which the defendant was registered was situate.

Talfourd, Serjt.—The question was not properly put, as it did not comprise the whole description of the voter’s qualification. The word “Penkhull” being at the head of a number of names, is just the same as if it were added to every one.

Godson, for the prosecution.—The qualification was a house in Eldon-place, in the borough of Stoke-upon-Trent, and these divisions are only

(*b*) See the cases of *Rex v. Harris*, 7 C. & P. 429, and *Regina v. Caspar*, 9 C. & P. 305. (*c*) This indictment had been removed by certiorari, and was tried at Nisi Prius.

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to assist in finding the voters more easily. They are not divisions which are recognized by the Reform Act. It might just as well be insisted that in putting the questions the officer should mention the voter's number on the register.

Whitmore, on the same side.—The description is the words contained in the lateral line with the voter's name, and that is the only part of the register that he is entitled to look to, and if his vote had been struck off by the revising barrister, the words in that line would have been struck out and the word "Penkhull" would have been left untouched. There is nothing in the Reform Act to authorize such a heading as "Penkhull," indeed it is contrary to the Reform Act, which directs the description to be "street, lane, or other place," which means place ejusdem generis.

PATTERSON, J.—I think that as there is but one Eldon-place in the borough it is sufficient.

It was proved that the election took place on the 30th of June, 1841, and that the defendant had left the house in Eldon-place, which he held at the time of the registration, and that he then removed to another house in Eldon-place next door but one to his former residence and resided there at the time of the election. It appeared that the two houses were of the same size and value. It was proved by Mr. Stevenson, that he had before the election told the defendant that having removed from one house to another in Eldon-place since the register, he had lost his vote, and that if he attempted to vote he would be liable to a prosecution; and it was also proved that before the election the defendant was served with a printed notice, which stated that he was not entitled to vote, as he had changed his residence.

Telford, Serjt., for the defendant.—This case differs from every other case which has preceded it, as the answer of the defendant was true in terms, and I do not here admit that there was even a mistake. The origin of all these difficulties is the Reform Act itself, which does not disqualify any of these voters, except by the inference that is to be drawn from the form of this third question. Indeed, in the *Southampton case*, a committee of the House of Commons was of opinion that all persons removing to qualifications of equal value in the same borough retained their votes, and though there have since been decisions the other way on the main question, yet there is no decision that goes to the extent of disqualifying a voter where he is within the description contained in the register, as in the present case; and even now, it may be doubtful whether the defendant had not a good vote. It has been proved that Mr. Stevenson, an opponent, told him not to vote, but still, if there was a fair doubt, the defendant was not likely to rely on the opinions of his opponents, and it might well be that the defendant was mistaken in supposing that a house in Eldon-street came within the meaning of the question, as it

does within its words, he having a qualification of the requisite value ; but even taking that not to be so, the defendant has done nothing morally wrong either before God or man, as he has, at the very most, only put a mistaken construction on his right of voting.

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PATTERSON, J. (in summing up).—I have no doubt that the words "the same qualification," mean the same property in respect of which the party was put on the register, and that the defendant ought to have answered "No," unless he was in the occupation of the *very same house* which he had at the time of the registration. The defendant had removed to the house next but one to his former residence, which is not the same qualification for which he was on the register ; and then comes the question, whether the defendant gave this untrue answer wilfully, and I think that the word "wilfully," should be here construed in the same way as in perjury, and be supported by the same sort of evidence. To be untrue is not enough, or to be wilful it must have been false to the knowledge of the party at the time, and if the present defendant has really misconstrued the facts, or misconstrued the law, he is not guilty of this offence, but it will be for you to say whether, after what had been said to him by Mr. Stevenson, and after the notice, the defendant's answer was wilfully false or not. It certainly was false, and you must determine whether it was wilfully so.

Verdict—Guilty.

Godson, and *Whitmore*, for the prosecution.

Talfourd, Serjt., *F. V. Lee*, and *Beadon*, for the defendant.

[Attornies—*Stevenson*, and *Young*.]

In the ensuing term, *Talfourd*, Serjt., in the Court of Queen's Bench, obtained a rule to shew cause why the judgment should not be arrested on the objections taken by him at the trial to the form of the indictment, which rule was, at the sitting of that Court, after Michaelmas Term, 1842, made absolute, no cause being shewn.

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On an indictment under the Reform Act, 2 & 3 Will. 4, c. 45, for giving a false answer at the poll at an election of members of parliament for a borough, it is not essential that the returning officer should himself put the three questions to the voters under sect. 58 of the Reform Act, 2 & 3 Will. 4, c. 45, it is sufficient if the town clerk do it in his presence, and by his direction; neither is it necessary to shew that the agent who required the questions to be put, was expressly appointed by the candidate; it is sufficient to shew that he has acted as agent for the candidate.

INDICTMENT on the 58th section of the Reform Act, 2 & 3 Will. 4, c. 45, for giving a false answer at the time of voting for a member of parliament for the borough of Walsall, at the election, on the 2nd of February, 1841, by the defendant stating that he had the same qualification for which he was registered. The indictment was in precisely the same form as that in the case of *Regina v. Bowler (a)*.

It appeared that the defendant had ceased to occupy the "house" in "Ablewell-street," for which he had been registered; but Mr. Whitgreave, the returning officer, stated, in giving his evidence, that he was not certain whether he had himself put the third question to the defendant, or whether the town clerk had put it in his presence, and by his authority, and it was also proved by Mr. Thomas, at whose request the third question was put, that he acted as the agent of Mr. Gladstone, but had not received any authority from that gentleman personally to act as his agent.

PATTERSON, J.—If the third question is put at the poll in the presence of the returning officer, by the town-clerk, by his direction, that is sufficient. It is not needful that he should put it with his own lips, neither need it be proved that the agent, who required the question to be put, was expressly appointed by the candidate. It is sufficient, if he acted as the agent for the candidate.

Verdict—Guilty.

Whitmore, for the defendant, took the same objections to the indictment which were taken by *Talfourd*, Serjt., in the cases of *Reg. v. Bowler* and *Reg. v. Ellis (b)*.

Judgment postponed.

PATTERSON, J.—As this is tried as a traverse, and has not been removed by certiorari, I shall postpone the judgment till after the decision of the Court of Queen's Bench in the case of *Regina v. Ellis*.

Godson, and *Beadon*, for the prosecution.

Whitmore, for the defendant.

[Attornies—*Barnett*, and *Kettle*.]

(a) *Ante*, p. 559.

(b) *Ante*, p. 564.

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REGINA v. GOODFELLOW and KNIVETON.

INDICTMENT against the defendant Goodfellow for perjury, and against the defendant Kniveton for subornation of perjury: the first count of the indictment was in the following form:—The jurors &c. present, that heretofore, to wit, on the 11th day of August, 1841, at the parish of Leek, in the county of Stafford, before Matthew Gaunt, Esq., and the Rev. Thomas Henry Heathcote, clerk, two of the justices of our said Lady the Queen, assigned to keep the peace in and for the said county, came one Joseph Osborne, of the parish aforesaid, in the county aforesaid, watchman, and then and their *exhibited* to and before the said Matthew Gaunt and Thomas Henry Heathcote, so being such justices as aforesaid, *a certain information upon oath*, and thereby informed the said justices that, on &c., at &c., certain quantities of silk and materials used in the manufacture of silk, to wit, twelve ounces weight of raw Brutia silk unwrought, two pounds and twelve ounces weight of raw Novi silk unwrought [enumerating a great quantity of wrought and unwrought silk, sewings in gum unwrought, &c.], suspected to be purloined and embezzled were found concealed in the dwelling-house and place of the said Thomas Kniveton, late of the parish aforesaid, labourer, by virtue of a warrant under the hands and seals of two of her Majesty's justices of the peace for the said county, pursuant to the statute in such case made and provided; and that he the said Joseph Osborne had cause to suspect and did suspect that the said silk and materials had

On the trial of an indictment for perjury, alleged to have been committed before magistrates, on the hearing of a case punishable on summary conviction, the conviction by the magistrates is not receivable in evidence, because it is irrelevant.

If an indictment for perjury allege that G. swore falsely before magistrates, on a charge against K. of receiving stolen goods. This will not be supported by proof that an information against K. on the stat. 17 Geo. 3, c. 56, s. 10, respecting purloined silk, was heard before the magistrates, and that on that hearing G. gave evidence that would have been material to a charge of receiving stolen goods by K.

Where to give magistrates

jurisdiction to hear a case punishable on summary conviction, it is essential that they should have an information on oath, made before them. It is not sufficient in an indictment for perjury, alleged to have been committed on the hearing of such information, to allege that before M. G., Esq., and T. H. H., clerk, two of the justices, &c., [the magistrates who heard the case], J. O. came and "exhibited a certain information upon oath," because it does not sufficiently shew that J. O. was sworn before M. G., Esq., and T. H. H., clerk.

In an indictment for perjury, an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to, and stated by the said J. G. upon his oath," is not a good averment of materiality.

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been purloined and embezzled; and that the said Thomas Kniveton had received the said silk and materials from some person or persons not entitled to dispose thereof, he the said Thomas Kniveton knowing that such person or persons was or were not entitled to dispose thereof, contrary to the statute in such case made and provided; that being the first offence of the said Thomas Kniveton against the said statute. And the jurors &c. do further present, that the said Thomas Kniveton afterwards, to wit, on &c., at &c., came in his own proper person before the said Matthew Gaunt and Thomas Henry Heathcote, so being such justices as aforesaid, and then and there pleaded to the said information, and said that he was not guilty of the said offence in the said information mentioned, in manner and form as in and by the said information was alleged. And the jurors &c. do further present, that afterwards, to wit, on the 18th day of August, in the year aforesaid, in the parish aforesaid, in the county aforesaid, the said Thomas Kniveton did personally appear before the said Matthew Gaunt, so being such justice as aforesaid, and the Rev. John Sneyd, clerk, one other of the justices of our said Lady the Queen, assigned to keep the peace in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; and the said Matthew Gaunt and John Sneyd did then and there, as such justices as aforesaid, proceed to hear and determine the matters of the said information. And the jurors &c. do further present, that, at and upon the hearing of the nature of the said information before the said Matthew Gaunt and John Sneyd, so being such justices as aforesaid, the said Thomas Kniveton did produce one James Goodfellow, late of &c., aforesaid, labourer, as a witness, to prove the sale of certain parts of the said silk and materials, by one James Broadhurst, of Macclesfield, being a person duly entitled to sell and dispose of the same, to the said Thomas Kniveton; and that the said Thomas Kniveton did then and there, upon the

said hearing of the said information, produce before the said Matthew Gaunt and John Sneyd, so being such justices as aforesaid, three paper writings as and for invoices of the said parts of the said silk and materials, so sold by the said James Broadhurst to the said Thomas Kniveton as aforesaid, one of which said paper writings was and is in the words, letters, and figures following; that is to say,

“ Mr. T. Kniveton,

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Bought of J. Broadhurst.

Feb. 26—To 55lbs. Gum Sewings, at 15s. 6d.—42l. 12s. 6d.

Settled same time.”

And another of which said paper writings was and is &c. [setting out the two other papers in like manner].

And the jurors &c. do further present, that at and upon the hearing of the said information, the said James Goodfellow, then and there, as such witness, by and before the said Matthew Gaunt and John Sneyd, so being such justices as aforesaid, was in due manner sworn, and did take his corporal oath upon the holy Gospel of God, they, the said Matthew Gaunt and John Sneyd, so being such justices as aforesaid, then and there having competent power and authority to administer an oath to the said James Goodfellow on that behalf. And the jurors &c. do further present, that, upon the hearing of the said information before the said Matthew Gaunt and John Sneyd, so being such justices as aforesaid, *it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said James Goodfellow upon his oath*; and that the said James Goodfellow, being so sworn as aforesaid, not having the fear of God before his eyes, &c., and being minded and desirous wrongfully and unjustly to cause the said Thomas Kniveton to be acquitted of the offence charged against him by the said information, then and there, to wit, on the said 18th day of August, in the year aforesaid, at &c., at and upon

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the hearing of the said information, by and before the said Matthew Gaunt and John Sneyd, so being such justices as aforesaid, did, as such witness as aforesaid, on his oath aforesaid, falsely, maliciously, wilfully, and corruptly say, depose, swear, and give evidence to and before the said Matthew Gaunt and John Sneyd, so being such justices as aforesaid, and as such justices hearing the matter of the said information as aforesaid, amongst other things, in substance and to the effect following; that is to say,—I, (meaning the said J. G.) have been present when James Broadhurst (meaning the said J. B.) has sold Kniveton (meaning the said T. K.) silk at three different times. It (meaning the said silk) was sewings in the gum. One sale was in February (meaning February, 1841,) of that sort of silk, &c. [setting out the evidence and assigning perjury on it]. The indictment then charged, that Thomas Kniveton “did, upon the hearing of the said information, unlawfully, wilfully, and corruptly suborn the said J. G. to depose, say, and give in evidence, upon his oath, before the said justices,” amongst other things, the said several matters and things hereinbefore alleged to have been falsely sworn to and deposed by the said J. G. upon his oath, on the hearing of the said information, before the said M. G. and J. S., so being such justices as aforesaid; “and that by means of the said corrupt solicitation, the said J. G. did, on the hearing of the information before the justices, falsely, corruptly, &c., say, depose, and swear the said several matters and things hereinbefore alleged to have been falsely sworn and deposed by the said J. G., upon his oath, upon the hearing of the said information; whereas, in truth and in fact, at the time when the said T. K. did solicit, incite, suborn, and procure the said J. G. to give such evidence upon his oath as aforesaid, he, the said T. K., well knew that he, the said J. G., would not give his evidence according to the truth, and that the same evidence so to be given was false, feigned, and altogether

fictitious. And so the jurors" &c., concluding in the usual form of an indictment for subornation of perjury.

The second count of the indictment charged, "that afterwards, to wit, on the 10th day of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, certain other silk, and materials used in the manufacture of silk, of the same quantity, quality, and description as the said silk and materials in the said first count mentioned, were found by one John Keates, then being constable of the townships of Leek and Lowe, in the said parish of Leek, in a certain warehouse of the said Thomas Kniveton there situate, and that the said John Keates, then and there having good, sufficient, and reasonable ground to suspect, and verily suspecting, that the said silk and materials had been feloniously stolen, taken, and carried away, and that the said T. K. had received the same silk and materials well knowing, at the time he so received the same, that the said silk and materials had been feloniously stolen, taken, and carried away, did, then and there, apprehend the said T. K., and him the said T. K., and the same silk and materials, did, within a reasonable time, to wit, on the 11th day of August aforesaid, at the parish aforesaid, in the county aforesaid, convey before the said M. G. and T. H. H., so being such justices as aforesaid, to be dealt with according to law." It then went on to state, that T. K. requested the said justices to grant him a reasonable time, in order to produce witnesses that he had become honestly possessed of the said silk and materials, and that the justices did appoint a reasonable time, to wit, the 18th of August, for the purpose aforesaid; and that then T. K. appeared before the said M. G., Esq. and J. S., clerk, to be examined touching his possession of the said silk and materials; and that the defendant, Goodfellow, at and upon the examination, came before the justices as witness and was sworn; and that, "upon the said examination of the said T. K., before the said M. G. and J. S., so being such justices as aforesaid, it then and

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there became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said J. G. upon his oath." [It then set out what he deposed before the magistrates, and assigned perjury upon it.]

The information recited in the indictment was put in and proved (a); it was then proved that the defendant Goodfellow, on the hearing of the information, gave the evidence stated in the indictment before Mr. Gaunt and Mr. Sneyd; and the counsel for the prosecution then offered in evidence a conviction of Kniveton by Mr. Gaunt and Mr. Sneyd upon the information.

J. Gray, for the defendant Goodfellow.—I submit that this evidence is not admissible. There is no allegation of this conviction contained in the indictment, and it is perfectly immaterial to the proof of the offence charged in this indictment, whether Kniveton was convicted by the justices or not; the defendant, Goodfellow, was no party in the question tried by the justices; their decision is therefore not now evidence against him.

Godson and Greaves, for the prosecution.—We are entitled to give in evidence the whole of the proceedings, and the conviction is a part of those proceedings; it is not improper to show what was done in consequence of Goodfellow's evidence.

PATTERSON, J.—The conviction has nothing to do with the present question; and I am of opinion that it is not admissible, on the ground that is irrelevant to the present issue (b).

(a) The information was founded on the stat. 17 Geo. 3, c. 56, the provisions of which will be found in Burn's Justice, tit. Servants, X.

(b) In the case of *Rez v. Dowlin*, 5 T. R. 311, which was an indictment for perjury committed on

the trial of Capt. Kimber for murder, Mr. Justice Buller says, "All that it is necessary to state is, that there was a certain cause &c., and that it came on to be tried in due form of law. Now, here it is expressly alleged 'that J. Kimber

The conviction was not given in evidence.

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Further evidence was then given, which established a *prima facie* case on the facts against both defendants; but it was not proved that any other charge had been made before the justices, than that contained in the information recited in the first count of the indictment.

J. Gray, for the defendant Goodfellow.—I submit that the second count is not proved. According to that count the charge against Kniveton before the justices was the ordinary charge of receiving stolen goods, knowing them to be stolen; but it is clear upon the evidence, that no inquiry took place before the justices upon any such charge; that contained in the information being a different and a specific charge under a particular act of Parliament, to which Kniveton pleaded not guilty; and the evidence was given upon that issue, and not in the course of any inquiry into a charge of receiving stolen goods.

Godson and Greaves, for the prosecution.—If evidence given in the course of an inquiry by magistrates into a charge made against a prisoner turn out not to prove that charge, but to prove another offence, the magistrates may commit for that other offence, and therefore the evidence is in truth evidence upon a charge of committing the second offence. Here the facts proved before the magistrates were such as would have been relevant to a charge of receiving stolen goods; and indeed the information in some degree assumes the shape of such a charge.

PATTESON, J.—The evidence here was given upon a specific issue; and I cannot help seeing from the information that this was not the ordinary charge of receiving stolen goods,

was in due form of law tried upon a certain indictment then and there depending against him, for the mur-

der of' &c. Therefore, the acquittal or condemnation of Kimber is immaterial."

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but a different one,—in fact, a charge of having committed an offence against the stat. 17 Geo. 3, c. 56. I think, therefore, the second count is not proved, and may be laid out of the question.

J. Gray.—There are three objections to the first count. First, there is no sufficient allegation that an information *on oath* was given to the justices. Secondly, the allegation that the evidence was material is bad and insufficient. Thirdly, the count is bad for want of certain introductory allegations: viz. an allegation that the silk was produced before the magistrates, and an allegation that Kniveton's evidence was given of and concerning the invoices and of and concerning the silk. With respect to the first objection, the allegation in the count is, that on &c., at &c., Osborne exhibited to and before the two justices a certain information *upon oath*, and thereby informed the said justices of certain matters. Where there is an information on oath before justices, the oath must be administered by the justices to whom the information is given. Suppose an information is put into writing and sworn to before A. and B., two justices, and then taken away and laid before C. and D., two other justices, who act upon it, this cannot be said to be an information on oath to C. and D., for, if it could, it might equally be so alleged if the oath had been taken before A. only, though the statute might require the information to be laid before two justices: the justices must receive the information under the sanction of an oath, and must know that they do so, which they can only legally do by actually administering the oath. Now it is consistent with the words in which the allegation is made in this count, that the information may have been sworn to before two other justices, and afterwards laid before Mr. Gaunt and Mr. Heathcote, or it may have been sworn to before one justice, who would not have jurisdiction; there are, in fact, two allegations—first, that Osborne exhibited before the two justices an information on oath;

secondly, that he thereby informed those justices of certain facts. With respect to the first, the facts that the information was pleaded to, and that the hearing was not before the same two justices who received it, shew that it was in writing; and if it were sworn before other persons and afterwards laid before Mr. Gaunt and Mr. Heathcote, that would literally prove the first allegation: then, as to the second, such a document would inform Mr. Gaunt and Mr. Heathcote of the facts stated in it, and so would literally prove that allegation, for it is to be observed that the words are not that Osborne thereby *on his oath* informed, &c. There being, therefore, no sufficient allegation of an information on oath, the whole foundation of the count fails, and it is bad. The second objection is to the allegation of the materiality of the evidence, that allegation is, that, upon the hearing of the information, "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said James Goodfellow upon his oath." The usual form, where an express allegation of materiality is made, is, that it became a material question, whether such a thing happened or existed; and this is proper, because the materiality of the question must be raised by the issue, and must have existence at the time the inquiry is entered upon, and before the witness gives his evidence. But according to the allegation here, the materiality did not exist till the witness had given his evidence; and there is this inconsistency in it,—the whole supposition of the count is, that the evidence is false, therefore, if the defendant be guilty, his allegations had no foundation in fact, nor does it appear even in suggestion, till he gave his evidence; and the plain meaning and construction of the words used, is, that when he had given his evidence, it became material to ascertain the truth of what he had stated; that might be so in point of fact, but then it is not alleged that he gave any evidence after it so became material.

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PATTESON, J.—May not this allegation be rejected as surplusage—does not the materiality appear independently of it?

J. Gray.—That question is involved in the third objection. Where an issue of fact is tried before any Court, the defendant, before he proceeds to prove his case, states, or may be supposed to state, the facts he means to prove, in order to make out the issue on his part; it may be that some of them are collateral facts, not glanced at in the issue, but when so stated, if they bear upon the issue, they become material, and that materiality arises and exists before the witness gives his evidence; and the ordinary form of allegation, that it was a material question whether so and so occurred, followed by the allegation that the witness gave evidence upon that question, is consistent with the materiality existing before the witness gave his evidence, but the form of allegation in this count only points at the materiality arising *after* the witness has made his statement, and not before; the effect of this is, that the matter alleged to be material is not alleged to have been material to the issue the justices were trying. The third objection is, that the evidence of Goodfellow, as set out in the count, shews, that it was given respecting certain invoices and certain silk then produced to him; and if it appears sufficiently by the count that the invoices he was giving evidence about were the invoices mentioned in the introductory averment, and that the silk was the silk or part of the silk mentioned in the information, it cannot be contended that the materiality of the evidence will not sufficiently appear, independently of the express averment; but with respect to the invoices, although there is an introductory averment that they were produced by Kniveton on the hearing of the information, there is no allegation that the witness in his evidence was speaking of those invoices; such a colloquium was necessary, and the want of it is not aided by the innuendo. In the case of *Rea v. Mars-*

den(c), which was an indictment for a libel respecting W. S., the indictment omitted to allege that the defendant published it "*of and concerning W. S.;*" and it was held, that this omission was neither supplied by the introductory allegation that the defendant intended to vilify W. S., nor by the conclusion, "to the injury and disgrace of W. S.," nor by the innuendoes, pointing the different parts of the libel to W. S. But as to the silk, there is neither an introductory averment of its production, nor a colloquium. It cannot, therefore, be intended that the invoices spoken of by the witness are the invoices mentioned in the introductory averment, nor that the silk is any part of the silk mentioned in the information; therefore, assuming that they were different, it does not at all appear that evidence respecting them was material to the matter of the information, and the express averment of materiality being bad, there is nothing to shew the materiality of the evidence.

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Godson and Greaves, for the prosecution.—As to the first objection—the word "exhibited" is a technical word, and when it is alleged that Osborne exhibited to and before the justices an information on oath, it means that he gave them information on oath. The word "exhibited" has always been used in this sense, and this is the ordinary form of allegation in cases like the present; and the forms in *Chitty*, on the Criminal Law (*d*), are framed in this way. But this objection has no force, because, in the present case, the statute does not require the information to be on oath; the information is under the stat. 17 Geo. 3, c. 56, s. 6, and as that does not require the information to be upon oath, the objection that the indictment does not shew it to be on oath comes to nothing. As to the second objection—the form of allegation here used is proper and sufficient, indeed, it is a better and more proper allegation than that such a thing became a material question, because it often happens

(c) 4 M. & S. 164.

(d) Vol. 2, pp. 431, 435, 437.

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that the question put to a witness is itself immaterial, but the answer he gives may be most material; this form of allegation has been used in several cases, and has never before been objected to. But this objection will not be fatal to the indictment, unless the third objection can also be sustained, and that objection cannot be sustained, because the innuendoes render it sufficiently clear what invoices and what silk the witness was speaking of in his evidence. No colloquium is therefore necessary.

J. Gray, in reply.—There is nothing technical in the word “exhibited,” it must have its ordinary meaning. The precedents referred to in *Chitty on the Criminal Law*, are cases of information not upon oath. This is not an information upon the 6th section of the statute, but upon the 10th section. Under the 6th section, no formal information is necessary, and the party is then merely brought before the justices on their warrant; whereas the 10th section expressly requires an information on oath, and here an information on oath was laid and duly pleaded to. As to the second objection—in the allegation of materiality in an indictment for perjury, the word question does not mean an interrogation, it means a subject of inquiry, therefore the reason given for not adopting the usual form has no force here. As to the third objection—the use of an innuendo is only to apply the words it explains to something already sufficiently alleged, it can never of itself supply a defective allegation.

PATTESON, J.—These are questions of some nicety, and before deciding them I will confer with my Brother *Cresswell*. (After having done so his Lordship said)—I have conferred with my Brother *Cresswell* on these objections, and he agrees with me that this indictment is bad. The first objection to the first count is, that it does not sufficiently appear that there was any information on oath. Now, it is quite consistent with the wording of this alle-

gation that the information may have been sworn to before justices who are not named in the count, or before one justice, or even before some person who was no justice at all, and it is impossible without some intendment to construe this as an allegation that the information was sworn to before the justices named in the count. I think I am not at liberty to make any such intendment, the allegation must contain what is necessary without intendment one way or the other, and I think that this allegation does not do so, for it does not even appear that the person who administered the oath had jurisdiction to do so. With respect to the forms cited from Chitty on the Criminal Law, they do not contain allegations of informations upon oath, and therefore are not applicable ; but in the same book, at page 440, I find a precedent with respect to articles of the peace, and there it is not only alleged that the articles were exhibited to the justices, but there is a separate and distinct allegation that the party was sworn to them before the justices. But it is said that an information on oath was not necessary ; it might perhaps be an answer to this to say, that the prosecutor has chosen to allege an information on oath ; and I am of opinion that an information on oath was necessary, for I think, for the reasons given, that this is an information on the 10th section and not on the 6th, and as the 10th section of the stat. 17 Geo. 3, c. 56, requires an information on oath, and as I think there is no sufficient allegation of an information on oath in the count, I am of opinion that it is bad, and the defendants must be acquitted. With respect to the second objection, as to the allegation of materiality, I am of opinion that that allegation is clearly bad ; it seems to me to be quite absurd to say that it became material to ascertain the truth of what the witness stated ; the witness's statement itself must be given to ascertain the truth of something which has become material to the inquiry before that statement has been made, therefore, if the materiality of the evidence did not appear from the other allegations of the count, I

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should hold the allegation in question to be quite insufficient. I am inclined to think the materiality does so appear, but it is unnecessary to decide that question, since the first objection is of itself fatal to the count. The second count has been already disposed of. I may observe, that my Brother *Cresswell* quite agrees with the view I have taken of this case. The defendants will be acquitted.

Verdict—Not Guilty.

Godson and *Greaves*, for the prosecution.

C. Phillips and *John Gray*, for the defendant Goodfellow.

Allen, for the defendant Kniveton.

[Attornies—*Croxon*, for the prosecution ; *Wordsworth*, for the defendant Goodfellow ; *Hilliard*, for the defendant Kniveton.]

REGINA v. ALLEN GOODE.

A. employed B. to take his barge from S. to E., and paid him his wages in advance, and gave him a separate sum of three sovereigns to pay the tonnage dues. B. took the barge 16 miles and paid tonnage dues to the amount rather under 2*l.*, and appropriated the remaining sovereign to his own use:—*Held*, a larceny.

LARCENY.—The prisoner was indicted for stealing one sovereign, the property of William Mullett, his master.

It appeared from the evidence of the prosecutor, that he engaged the prisoner to take a canal boat on a voyage from Stourbridge to Ellesmere Port, and that he paid the prisoner 5*l.* for his wages in advance and for the keep of the towing horse, and also gave him a separate sum of three sovereigns to pay the tonnage dues on the canal.

Evidence was given to shew that the prisoner had taken the boat about sixteen miles, and had paid tonnage dues which amounted to rather under 2*l.*, and that the prisoner had appropriated the remaining sovereign to his own use.

Allen, for the prisoner.—I submit that this is mere breach of contract, and that the relation of master and

servant does not exist. Nor is there even any contract of which time forms the essence.

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PATTESON, J.—Taking that to be so, it does not appear to me to be material to the case. The prosecutor distinctly states that he gave this man three sovereigns to pay the tonnage dues, and it appears that he has made away with one of the sovereigns. To constitute a larceny in this case there is no occasion to shew that the relation of master and servant existed. If I give a man money to apply to a particular purpose, and he appropriates it to another purpose, with a felonious intent, he is guilty of larceny.

Allen.—I submit, that to constitute a larceny there must be some trespass.

F. V. Lee, for the prosecution.—Whether the prisoner was a servant or not, this money was put into his charge for a particular purpose, and, as I submit, this misappropriation of it is a larceny.

PATTESON, J.—If a man were to employ another to go somewhere with his horse for a certain price, that other is for that purpose his servant; but if in addition to this he gives him a distinct and separate sum of money to be disbursed in a particular way, and if instead of so disbursing it he appropriates it to his own use, that is a felony.

Allen addressed the jury on the evidence.

Verdict—Not guilty (a).

F. V. Lee, for the prosecution.

Allen, for the prisoner.

[Attornies—*Rogers*, and *W. Brown*.]

(a) See the cases of *Regina v. C. Jones*, post, p. 611; and *Regina v. Beaman*, post, p. 595; *Regina v. Evans*, post.

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(Crown Side.)

BEFORE MR. JUSTICE CRESSWELL.

REGINA v. BOSWELL, JOSEPH WILKES, JAMES WILKES, and
GILES.

MURDER.—The prisoners were charged with the wilful murder of Matthew Adams, on the 1st of December, 1841, at the parish of Wednesbury.

It appeared that the prisoner Boswell was taken into custody on the 2nd of December on this charge, and that on the 11th of December he made certain statements, which were sought to be given in evidence.

To prove one of these statements a policeman named Hatherley was called, who said that he had held out no inducement to the prisoner Boswell to make any statement, nor did he know that any one else had done so to the 11th of December, when the statement was made; but he further said, that on the 6th of December he knew a reward of £100 had been offered by the government for the discovery of this murder, accompanied by a statement that the Secretary of State would recommend an accomplice, not being the person who actually committed the murder, for a pardon, but the witness could not state that this had come to the knowledge of the prisoner.

E. Yardley, for the prisoner Boswell, asked to have some of the other witnesses (whose names were on the indictment)

The mere knowledge by a prisoner of a handbill, by which a government reward and a promise of a pardon are offered in a case of murder, are not sufficient ground for rejecting a confession of such prisoner, unless it appear that the inducements there held out were those which led the prisoner to confess.

Where a prisoner desired that any handbill that might appear concerning a murder with which he stood charged might be shewn to him, and a handbill was shewn to him by a constable, by which a reward and free

pardon was offered to any but the person who struck the blow, and the prisoner three days afterwards made a statement, this statement was held to be receivable in evidence.

But where it was afterwards proved by another constable, that the prisoner, on the night before he made the statement, said to him, that he saw no reason why he should suffer for the crime of another, and that as the government had offered a free pardon to any one concerned who had not struck the blow, he would tell all he knew about the matter. The judge held that the statement that had already been given in evidence was not properly receivable, and struck it out of his notes.

ment) called, with a view of shewing that the prisoner Boswell had had this communicated to him.

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CRESSWELL, J.—I think I cannot allow you to do that.

The statement of the prisoner Boswell made to the witness Hatherley was given in evidence.

In a later part of the case a policeman named Raymond was called, and in his cross-examination he stated that soon after the prisoner Boswell had been taken into custody, and before the 6th of December, the prisoner Boswell requested that he (the witness) would let him know if any reward should be offered or any papers published concerning the murder, and that he would bring any such papers to him (the prisoner) as soon as they were printed. This witness further stated, that on the 6th of December it was generally known that the Secretary of State had offered a reward and a promise of a free pardon to any of the offenders except such as had struck the blow; and that on the 13th of December the witness gave one of the printed handbills to the prisoner Boswell.

The handbill was in the following form :—

“£100 Reward.

“Burglary and Murder.

“Whereas on the night of Friday, the 30th of November last, the dwelling-house of Matthew Adams, of &c., was feloniously and burglariously broken into, &c. [It then stated, that Matthew Adams had had his skull fractured with some blunt instrument, and that he died on the following evening.]

“The circumstances of the murder having been represented to the Secretary of State for the Home Department, a reward of one hundred pounds will be paid by Government to any person who shall give such information and evidence as shall lead to the discovery and conviction of the person or persons concerned in the said murder; and the Secretary of State will recommend the grant of her

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Majesty's gracious pardon to an accomplice, not being the person who actually committed the murder, who shall give such information as shall lead to the same result."

F. V. Lee, for the prosecution, proposed to ask the witness Raymond as to a statement made by the prisoner to him on the 11th of December.

E. Yardley.—I submit that that statement is not receivable in evidence, as it now appears that a promise of pardon made by competent authority had been communicated to the prisoner previously to the time when he made his statements, and it must be taken that these statements were made in the hope of the pardon so promised. In the case of *Rex v. Hall* (a) the prisoner, who was tried for a burglary, had desired one of the witnesses to apply to the magistrate to admit him as witness for the Crown, for that he had not entered the house, but had only stood at the door while the other two prisoners went up stairs to commit the felony; and on a witness being called to prove that the prisoner said this, his counsel objected that as this confession was made with a view and under the hope of being thereby permitted to turn King's evidence, it was not admissible, and the learned Judge (Mr. Serjt. *Adair*), being of opinion that this was not a *voluntary* confession, rejected the evidence.

F. V. Lee.—I submit, that in order to exclude these declarations, it must be shewn affirmatively that they were made under the influence of the hope of the pardon.

CRESSWELL, J. (having conferred with *Patteson*, J.)—We think that the evidence is receivable.

The witness Raymond gave evidence of the statement made by the prisoner Boswell to him.

(a) 2 Leach, C. C. 636, n.

In a later part of the case, it appeared from the evidence of another witness that, on the evening of the 10th of December, the prisoner Boswell said that he saw no reason why he should suffer for the crime of another, and that as government had offered a free pardon to any one of the parties concerned who had not struck the blow, he would tell all he knew about the matter.

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CRESSWELL, J.—It now appears with sufficient clearness that the prisoner in making the statements ascribed to him was influenced by the hope of pardon held out by authorized parties. I shall, therefore, reject the evidence of all statements made by him after the evening of the 10th of December, and expunge from my notes such as have already been given in evidence.

His Lordship struck out from his notes the statements of the prisoner Boswell, which had been proved by the witnesses Hatherley and Raymond.

Verdict — Joseph Wilkes, guilty; the other prisoners, not guilty.

F. V. Lee and *Whitmore*, for the prosecution.

E. Yardley, for the prisoners Boswell and Giles.

[Attornies—*Stubbs*, and *Passman*.]

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BEFORE MR. SERJEANT LUDLOW.

REGINA v. SIMEON WALTERS.

If the course of dealing between A. and B. is, that A. shall write persons' name in a list with a sum against each name, on sight of which B. is to furnish goods on the credit of A. to each person whose name is on the list, to the amount set against his name,—such list is a request for the delivery of goods, and the fraudulent alteration of one of the sums in it is indictable as a forgery under the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 10.

FORGERY.—The prisoner was indicted for feloniously altering a certain request for the delivery of goods with intent to defraud John Bradley. In a second count the prisoner was charged with uttering a forged request for the delivery of goods with intent to defraud John Bradley, and in the 3rd and 4th counts with altering and with uttering it with intent to defraud George Jones. The forged instrument was not set out in either of the counts.

It was opened by *Corbett* for the prosecution, that Mr. John Bradley was a butty-coller at Bilston, and Mr. George Jones a grocer at that place, and that the course of dealing between them was for Mr. Bradley to write a list of names, with an amount against each name, which denoted that Mr. Jones was to supply that person with goods on Mr. Bradley's account to the amount set opposite his name; and that on the 22nd of October the prisoner took the paper to Mr. Jones's, and his own name having been originally inserted in it for 5s., he put a figure of 1 before the 5 and made it 15s., and in that state presented it at Mr. Jones's shop. The question would be whether this list was a request for the delivery of goods within the stat. 11 Geo. 4 & 1 Will. 4, c. 66.

The paper as altered by the prisoner was in the following form:—

1841—Oct. 22.	£	s.	d.
Eliz. Bradley	0	12	0
Will. Jones	1	0	0
J. Prise	0	5	0
Jno. Bayley	0	5	0
Peter Stapleton	0	8	0
Simeon Walters	0	15	0

[Here followed ten more names and a sum against each, and the sums were cast up 7*l.* 4*s.* 6*d.*, which was the correct casting if the sum opposite the prisoner's name had remained 5*s.* as it originally stood.]

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Opposite the sum 7*l.* 4*s.* was the prosecutor's signature, "Jno. Bradley."

LUDLOW, Serjt. (having conferred with *Patteson*, J.)—Mr. Justice *Patteson* is of opinion, that although this is not a request for the delivery of goods on the face of it, yet it may be shewn by evidence that the course of dealing between the parties was, that goods should be delivered on the production of such documents as this; and that being shewn, this paper is a request for the delivery of goods, and as such may be the subject of an indictment, if a forged alteration be made in it.

The facts of the case were proved as opened.

Verdict—Guilty. Sentence—Two years' imprisonment.

Corbett, for the prosecution.

[Attorney—*Watson*.]

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SHROPSHIRE ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE CRESSWELL.

WALKER, Executor of WALKER, v. ROBERTS.

A document in the following form : " W. W. lent to J. R. the sum of 19*l.* 19*s.* 11*d.* to receive five per cent. for the same 19*l.* 19*s.* 11*d.*; to pay on demand to the said W. W., giving J. R. six months' notice for the same," is a promissory note, and not an agreement.

ASSUMPSIT by the plaintiff, as the executor of the payee, against the defendant, as maker of a promissory note, dated February, 1831, for 19*l.* 19*s.* 11*d.*, with interest, on demand, six months after notice.

Plea—non assumpsit.

The note, which was proved to have been written by the defendant's wife by his authority, was in the following form :—

" Feb., 1831.—Wm. Walker lent to James Roberts 19*l.* 19*s.* 11*d.*, to receive five per cent. for the same 19*l.* 19*s.* 11*d.*; to pay on demand to the said Wm. Walker, giving James Roberts six months' notice for the same.

" Witness my hand,

" JAMES × MARY ROBERTS."

It appeared that the interest had been paid to February, 1838, and that there had been six months' notice given, and a demand made after the six months' notice had expired.

J. G. Phillimore, for the defendant.—I submit that this is an agreement to pay money on certain conditions, and is not a promissory note; and that it ought to be stamped as an agreement and not as a promissory note, as it is.

CRESSWELL, J.—I think it is a promissory note.

Verdict for the plaintiff.

R. V. Richards and *Venables*, for the plaintiff.

J. G. Phillimore, for the defendant.

[Attornies—*Lozdale Warren*, and *Stanley*.]

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BRADSHAW v. HAYWARD.

ASSUMPSIT for wages and salary of the plaintiff for services done and performed as servant of the defendant.

Plea, non assumpsit.

It appeared that the defendant was an innkeeper, and it was proved that the plaintiff had lived in his house for several years, and had waited on the customers and done other acts of service.

R. V. Richards, in cross-examining one of the plaintiff's witnesses, put questions with a view of shewing that the plaintiff had lived with the defendant as his mistress.

Corbett and *Greaves*, for the plaintiff, submitted that he had no right to do so, as non assumpsit alone was pleaded. It was clear, that if an express contract in writing had been proved the defendant could not have shewn its illegality under the plea of the general issue; and as evidence was given here which led to the inference that a contract existed between these parties, no illegality in the consideration could be given in evidence under the plea of non assumpsit. By the rule of H. T. 4 Will. 4, "in all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied in law;" and in the case of *Potts v. Sparrow* (a), which was an action of assumpsit by an attorney to recover his bill of costs for preparing a deed, and also costs of an action instituted in pursuance of that deed, in which action his client had failed in consequence of the deed having been held void on the ground of maintenance, it was held that the defendant could not set up the ille-

In assumpsit by the plaintiff for wages as a female servant, the defendant pleaded non assumpsit, and the plaintiff gave evidence of acts of service. The defendant proposed to go into evidence to shew that the plaintiff had cohabited with him:—*Held*, that he might do so on the plea of non assumpsit, as this went to shew that there was no contract between the parties, and not to invalidate any contract on the ground of illegality.

(a) 1 Scott, 578.

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gality of the contract in answer to the action under a plea of non assumpsit.

CRESSWELL, J.—The issue is, whether there was a contract of hiring and service or not. If an express contract had been proved, and the defendant had attempted to set up that the contract was not only for service but for cohabitation, the defendant could not have set that up without pleading it; but in my judgment he is entitled to prove cohabitation here, as tending to shew upon what terms the plaintiff remained in his house. The plaintiff endeavours to shew by acts of service that there was a contract. The defendant wishes the jury to infer that there was no contract of hiring and service; he is not seeking to discharge himself from any contract, but to shew that there was no contract at all.

The questions were put in cross-examination; and witnesses were called for the defendant with a view of proving that the plaintiff cohabited with him.

Verdict for the plaintiff.

Corbett and Greaves, for the plaintiff.

R. V. Richards, for the defendant.

[Attornies—*Johnson*, and *Heaton*.]

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(*Crown Side.*)

BEFORE MR. JUSTICE PATTESON.

REGINA v. HUGHES.

LARCENY.—The prisoner was indicted for stealing a pair of trousers, the property of John Jones.

It appeared that John Jones had bought the cloth of which the trousers were made, and had paid for it, but that the trousers were made for Thomas Jones, his son, who was seventeen years of age; and it was proved by John Jones that his son lived with him, and he provided his son with clothes, his son not being an apprentice but a labourer like himself, both working for the same master.

If a father buy and pay for cloth which is made into trousers for his son, who is seventeen years of age, these trousers may, on an indictment for larceny, be laid as the property of the father.

In such cases the property may be laid either in the father or the son, but the better course is to lay it in the latter.

PATTESON, J.—I think that the property is well laid. In cases of this kind it may be laid either in the father or the child, but the best course is to lay it in the child.

Verdict—Guilty.

Greaves, for the prosecution.

[Attorney—*Bradley*.]

REGINA v. SWINNERTON and BOWYER.

LARCENY.—The prisoner Swinnerton was charged with stealing hay, the property of John Bishton Minor, his master, and the prisoner Bowyer with having received the hay knowing it to have been stolen.

If two prisoners be taken before a magistrate on a charge of felony, what the first prisoner says in his

statement before the magistrate cannot be given in evidence against the second prisoner, because, when before the magistrate, the second prisoner is only called upon to answer the statements in the depositions taken on oath, and not what any other prisoner may have said in his examination.

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The prisoner Swinnerton had pleaded guilty.

It appeared that when the prisoners were examined before Mr. Burton, who was the committing magistrate, the prisoner Swinnerton, when called on to answer the charge, made a statement in the hearing of the prisoner Bowyer, which statement was taken down; and that the prisoner Bowyer then made a statement, which was also taken down, and was as follows:—"I must beg pardon that I had it; I reckon that it was not right that I took it. If I had not picked it up some one else would." The statement of the prisoner Bowyer was given in evidence, and *Corbett*, for the prosecution, proposed to put in the statement of the prisoner Swinnerton.

E. Yardley, for the prisoner Bowyer, submitted that it was not receivable in evidence.

Corbett, for the prosecution.—I submit that the rule, that what one prisoner says in the presence of another prisoner is evidence against the latter, is universal in its application.

PATTESON, J.—When before the magistrate, a prisoner is called upon to answer depositions taken on oath, but he is not called upon to make any answer to the statement of another prisoner. I think, therefore, that the examination is not admissible evidence in this case.

Evidence rejected.

The prisoner Bowyer was acquitted.

Corbett, for the prosecution.

E. Yardley, for the prisoner Bowyer.

Attornies—*R. Lozdale*, and *J. H. Edwards*.]

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REGINA v. BEAMAN.

LARCENY.—The prisoner was indicted for stealing one shilling, the property of Samuel Elliot Walter, his master.

A servant was sent with 6s. to buy 12 cwt. of coals; he bought a smaller quantity, for which he paid 3s. 3d., and appropriated one of the shillings to his own use: — *Held*, a larceny.

It appeared that the prisoner was directed by the prosecutor, who was his master, to fetch twelve hundred-weight of coals, and that the prosecutor's daughter gave the prisoner six shillings, which she had received from her father to give to the prisoner to pay for the coals. It was proved that the prisoner, instead of procuring twelve hundred-weight of coals, bought only nine hundred-weight, the price of which was three shillings and three pence, and that he gave four shillings in payment, and received nine pence in change. It further appeared that the prisoner afterwards gave back one shilling to the prosecutor's daughter, and made a false statement as to the quantity of coals he had bought, and appropriated the remaining shilling to his own use.

PATTESON, J.—If the prisoner appropriated the shilling to his own use, under the circumstances that have been proved, he is guilty of larceny.

Verdict—Guilty (a).

Corbett, for the prosecution.

Meteyard, for the prisoner.

[Attornies—*E. Garbett*, and *Downes*.]

(a) See the cases of *Regina v. Jones*, post, p. 611; and *Regina v. Goode*, antè, p. 582; *Regina v. C. Evans*, post.

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REGINA v. HUXLEY, BRAYN, GOSNELL, and GROOM.

An indictment for an assault with intent to rob, which charges that the prisoner, in and upon R. B., feloniously did make an assault, "with intent the monies, goods and chattels of the said R. B., from the person and against the will of the said R. B., then and there feloniously and violently to rob, steal, take, and carry away, against the form of the statute," &c., is good.

ASSAULT, with intent to rob.—The indictment stated that the prisoners, on &c., at &c., "in and upon Robert Blantem, in the peace of God and our said Lady the Queen, then and there being, feloniously did together make an assault, with intent the monies, goods, and chattels of the said R. B., from the person and against the will of him the said R. B., then and there feloniously and violently to rob, steal, take, and carry away, against the form of the statute," &c.

Soon after the bill was found by the grand jury,

PATTESON, J., said, that he entertained some doubt whether this indictment was good, as it did not charge in so many express words that the prisoners had an intent to rob the prosecutor.

Mr. Goodman, the clerk of indictments, stated that this was the form that had been used at the Central Criminal Court ever since the passing of the stat. 7 & 8 Geo. 4, c. 29, s. 6.

PATTESON, J. (after having conferred with *Cresswell*, J.) —Upon further consideration my Brother *Cresswell* and myself are both of opinion that the indictment in its present form is sufficient.

The case was tried.

Verdict—Guilty of an assault (a).

J. G. Phillimore, for the prosecution.

C. Phillips and *F. V. Lee*, for the prisoner.

[Attornies—*Marcey*, and —.]

(a) Under the stat. 1 Vict. c. 85, s. 11.

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REGINA v. CRUMPTON.

MANSLAUGHTER.—The first count of the indictment stated, that on the 3rd day of February, 1842, at &c., one Richard Kesterton [the deceased] “was then and there an apprentice to one Joseph Crumpton [the prisoner], and as such apprentice was then under the care and control of the said Joseph Crumpton; and that it then and there became and was the duty of the said J. C., during the time aforesaid, to permit and suffer the said R. K. to take and have such proper exercise as was necessary and needful for the bodily health of the said R. K., so being such apprentice as aforesaid; and it then and there became and was the duty of the said J. C. to find, provide, and supply the said R. K., being such apprentice as aforesaid, with proper and necessary nourishment, medicine, medical care, and attention;” and that the deceased being weak in body, the prisoner struck and beat him, and forced, obliged, and compelled him to work for an unreasonable time, and would not allow him to take proper exercise and recreation, and neglected to supply him with proper nourishment and medicine, medical care, and attention, by means whereof he died. The second count stated that the prisoner in and upon the deceased, “so being *such apprentice as aforesaid*, and under the care and control of him the said J. C. as aforesaid, and so being sick and weak in body as aforesaid, in the peace of God and our said Lady the Queen, feloniously did make an assault;” and that the deceased being so weak in body as aforesaid, the prisoner forced him to work for certain unreasonable and

An indictment for manslaughter stated in the first count that the deceased was the apprentice of the prisoner, and that it was the duty of the prisoner to provide the deceased with proper nourishment, medicine, &c., and charged the death to be from neglect, &c. The second count charged that the deceased, “so being *such apprentice as aforesaid*,” was killed by the prisoner by over-work and beating. No evidence was given of any indenture, but a witness proved that the prisoner told him that the deceased was his apprentice:—*Held*, that this was sufficient proof of the allegation of the apprenticeship in the second count, but not of that in the first count.

In a case of manslaughter, the prisoner cannot be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85, unless that assault is the subject-matter of the charge and embodied in the charge, and which would of itself have been the felony but for some other cause, and the jury ought not, on a charge of manslaughter, to convict the prisoner of an assault, unless that assault conduced to the death of the deceased, although the death itself was not manslaughter.

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improper times, and beat him, by means whereof he died.

It appeared from the evidence of John Cornelius Carpenter, that the prisoner was a master tailor, and that the deceased, who had been in ill-health for more than a year before his death, and had had a bad cough, was kept at work by the prisoner, (in whose house he lived), on some occasions, from six o'clock in the morning till eight or nine at night, and that about five weeks before the death of the deceased the prisoner beat the deceased with a small cane. It was further proved that the deceased, who was between sixteen and seventeen years of age, left the prisoner's house at Bilston, and came to the house of his grandfather, at Ketley, near Wellington, on the same evening, and remained there till his death, which occurred three weeks after. To prove that the deceased was the apprentice of the prisoner, Mr. Wace was called, who stated that he asked the prisoner if the deceased was his apprentice, and the prisoner said that he was.

Ludlow, Serjt., for the prisoner.—I submit that the indenture must be given in evidence. The first count of the indictment not only states that the deceased was an apprentice, but what were the duties of the prisoner as his master; and in the second count it is stated, that the deceased, "so being such apprentice as aforesaid," was assaulted, &c., thus referring to the apprenticeship mentioned in the first count.

F. V. Lee, on the same side.—The duty of the master as stated in the first count is to provide medical attendance, which is not a term in a great number of indentures, and whether it was so or not in this case can only appear by the production of the indenture itself.

Patteson, J.—I quite agree with you as far as that goes.

F. V. Lee.—The second count is, “so being such apprentice as aforesaid,” which means modo et formâ as in the first count, and, as I submit, subject to all the terms and duties stated in that count.

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Carrington, for the prosecution.—The words, “so being such apprentice as aforesaid,” only import that the deceased was the apprentice of the prisoner, without implying any duty as arising therefrom, except such as arises from the legal relation of master and apprentice. In the case of *Regina v. Martin (a)*, the first count of the indictment charged the defendant with having assaulted “Eliza Ricketts, an infant, above the age of ten and under the age of twelve years;” and the second count charged the defendant with having attempted to know and abuse “*the said* Eliza Ricketts,” and it was there held that the second count was bad, because it did not allege that Eliza Ricketts was between the ages of ten and twelve, and that the words “*the said* Eliza Ricketts” merely meant that she was the same person who was mentioned in the first count, but that those words did not import into the second count the description of Eliza Ricketts with respect to her age.

PATTESON, J.—I think there is sufficient proof of the apprenticeship to support the second count.

It was proved by Mr. M'Knight, a surgeon who examined the body of the deceased after death, that the deceased died of consumption, and that over-work and ill-usage *might* have accelerated his death, but Mr. M'Knight was not able to say that it had done so. This witness also stated that he found bruises on the legs of the deceased, but that those bruises could not at all have contributed to his death.

(a) 9 C. & P. 215.

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PATTESON, J.—This puts an end to the charge of manslaughter.

Carrington.—I submit, that upon this evidence the prisoner may be convicted of an assault, under the stat. 1 Vict. c. 85, s. 11.

Ludlow, Serjt.—If the assault had contributed to the death of the deceased that might be so; but to come within the provisions of the statute 1 Vict. c. 85, it must be an assault connected with the cause of death charged, and must also be an assault connected with the cause of death proved, and not a distinct and independent assault.

Carrington.—The words of the 11th sect. of the stat. 1 Vict. c. 85, are, "where the crime *charged* shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a *verdict of guilty of assault* against the person indicted, *if the evidence shall warrant such finding.*" The crime here *charged* includes an assault, and the evidence will warrant the finding the prisoner guilty of an assault.

PATTESON, J.—I think that, in order to convict a person of an assault under the 11th sect. of the stat. 1 Vict. c. 85, it must be an assault which is the subject-matter of the charge, and embodied in the charge, and which would itself be the felony but for some other cause. If it were otherwise, it would be easy in a case of manslaughter to convict a person of an assault which had really nothing to do with the case, by merely stating it in the indictment as a part of the cause of the death. I think that no assault is included in a charge of manslaughter which does not conduce to the death of the deceased, although the death itself be not manslaughter. Here the surgeon disconnects

this assault from the death, and I think, therefore, that the prisoner is entitled to be acquitted altogether.

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Verdict—Not guilty (*b*).

Carrington and *Allen*, for the prosecution.

Ludlow, Serjt., and *F. V. Lee*, for the prisoner.

[Attornies—*E. Garbett*, and *Brown*.]

(*b*) See the cases of *Reg. v. George*, Id. 483 ; *Reg. v. Phelps*, *Ellis*, 8 C. & P. 654 ; *Reg. v. antè*, p. 180 ; *Reg. v. M'Phane*, *Nichols*, 9 C. & P. 267 ; *Reg. v. antè*, p. 212, and *Reg. v. Watkins*, *Gutteridge*, Id. 471 ; *Reg. v. St. antè*, p. 264.

REGINA v. HUMPHREYS.

March 21st.

THE prisoner had been committed on a charge of having burglariously broken into the house of William Lloyd, Esq., and stolen a haddock.

On Saturday, the 19th of March, a bill of indictment upon that charge was sent before the grand jury, and they having examined all the witnesses whose names were on the draft of the bill except two, who did not answer when called, ignored the bill.

On Monday, the 21st of March, another bill of indictment, precisely similar to that ignored on the previous Saturday, was sent before the grand jury.

The Hon. Thomas Kenyon, the foreman of the grand jury, came into court, and asked the learned Judge what the grand jury ought to do, as they were informed that the two witnesses who were absent when called on Saturday were now in attendance.

If the grand jury at the assizes or sessions have ignored a bill, they cannot find another bill against the same person for the same offence at the same assizes or sessions, and if such other bill be sent before them they should take no notice of it.

PATTESON, J.—When I was first informed of this matter by the proper officer, I inclined to think that a second bill might be sent before you, but on further consideration I think

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it cannot. If the grand jury at the assizes or sessions have ignored a bill, they cannot find another bill against the same person for the same offence at the same assizes or sessions. It is laid down in the books of practice that it cannot be done, though I know of no express case on the subject; and I think it would lead to great inconvenience if it could be done. I think that you ought not to ignore this second bill and you cannot find it, and that the proper course is for you not to take any further notice of it.

REGINA v. LANGFORD, PALMER, PHILLIPS, POWELL, and PALMER.

On an indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for the feloniously demolishing a house by rioting, it is a sufficient demolishing of the house if it be so far destroyed as to be no longer a house; and the fact that the rioters left a chimney standing will make no difference.

The stat. 7 & 8 Geo. 4, c. 30, s. 8, not having given any definition of what shall be a riot within the meaning of that enactment, the common-law definition of a riot must be resorted to, and

in such a case, if any one of her Majesty's subjects be terrified, this is a sufficient terror and alarm to substantiate that part of the charge of riot.

If persons riotously assemble and demolish a house, *really believing* that it is the property of one of them, and act *bond fide* in the assertion of a supposed right, this will not be a felonious demolition of the house within the stat. 7 & 8 Geo. 4, c. 30, s. 8, even though there be a riot.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for feloniously demolishing a house. The first count of the indictment charged that the prisoners unlawfully, riotously, feloniously, and tumultuously assembled together, to the disturbance of the public peace, and that being so assembled they feloniously, unlawfully, and with force began to demolish and pull down the dwelling-house of William Palmer. The second count was for riotously assembling and feloniously demolishing and pulling down the house.

It appeared in evidence that William Palmer, the elder, had lived in the house in question, which was a cottage, for forty-five years, during the latter part of which time he had suffered his son, William Palmer the younger, to occupy an adjoining cottage, which also belonged to him. It further appeared, that about the month of January, 1840, William Palmer the elder lost his wife, whereupon the prisoner Phillips, who had married his daughter, came with his wife and lived with William Palmer the elder, he

maintaining himself ; and it appeared that while they lived together it was agreed between them that the old man should sell the cottage to Phillips, but should continue to live in it, and they should look after him for the rest of his life. No writing was ever signed by either of them, nor was any money paid. The old man was asked to sign some papers, but he always refused to do so unless he was paid the money. After some time, the old man desired Phillips and his wife to go away, and upon their refusal summoned them before a magistrate, who refused to interfere. The old man then took advantage of Phillips being absent at his work, about twelve miles off, and with the assistance of his son William turned his daughter Phillips and her children and furniture out of the cottage. The next day all the four prisoners came to the cottage while the old man and his son William were there ; they thrust two notices through the window, one for the old man, the other for his son William, and demanded possession ; the old man refused to give it, and then Phillips with an axe began to knock down the end of the cottage ; he knocked part of the wood-work against the old man and drove him back, and then knocked down the door and forced his way in ; he then caught the old man by the collar, and said "Come, you must go out of this house." The old man did go out, and the prisoners pulled the cottage down to the ground, with the exception of the chimney. The prisoner Langford, who was a sheriff's bailiff, asked William Palmer the younger what he would give them not to pull down the wall which separated the two cottages, and on his refusal to give anything, Langford said to Phillips, "You may do what you like with your own, and the wall may be knocked down." The old man stated that he was frightened.

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C. Phillips, for the prisoners Palmer, Phillips, and Powell.—I submit, that there was in this case no riot, and that it is at the most a civil trespass. It is essential to a

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riot that it should be to the terror and alarm of her Majesty's *subjects*, but here the only person that was at all alarmed was the old man.

PATTESON, J.—I think there is sufficient evidence to go to the jury as to the riot.

W. Johnstone Neale, for the prisoner Langford.—I submit that the first count of the indictment, which is for beginning to demolish the house, is not sustained, as the prisoners did all that they intended to do, and were not interrupted; and with respect to the second count for the actual demolition of the house, I submit that this is not proved, the house not being demolished, as a chimney was left standing.

PATTESON, J.—I think that, as the cottage was destroyed to such an extent as to be no longer a house, it is a sufficient demolition within this statute. It can never be said that a house is not demolished because a few stones are left standing one upon another.

C. Phillips, and *W. Johnstone Neale*, addressed the jury.

PATTESON, J., (in summing up).—The stat. 7 & 8 Geo. 4, c. 30, which enacts, "that if any persons *riotously* and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy" "any house," &c., shall be guilty of felony, gives no definition of what is a riot; it is therefore necessary to resort to the common law, by which a riot is defined to be "a tumultuous disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whe-

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ther the act intended were of itself lawful or unlawful" (a). A riot must be attended with circumstances of terror to the people. No one appears here to have been alarmed but the old man, but if you find that such force was used by the prisoners as to terrify the old man, I think that in point of law there was a riot, and the question for you to consider on that part of the case is, whether this assembly was attended with circumstances of alarm and terror to *any* of her Majesty's subjects, for if it was, I think that it amounts to a riot. I think, also, that on this statute a felonious demolition of a house can only be where a number of persons begin to demolish or actually demolish the house from some wrong motive or other. If therefore you believe that there was a riot, and that these persons to spite the old man did that which the witnesses have stated them to have done, it is a felonious demolition of the house within the meaning of this act of Parliament. But even if there was a riot, if you believe that the prisoners really thought that it was young Phillips's house, and that they did all this *bonâ fide* in the assertion of a supposed right, that will take the case out of the operation of the statute, and the demolition of the house would not be felonious, and you ought to acquit the prisoners.

The jury found all the prisoners guilty (b).

PATTESON, J.—I shall reserve the case for the opinion of the Judges.

J. G. Phillimore, for the prosecution.

C. Phillips, for the prisoners Palmer, Phillips, and Powell.

W. Johnstone Neale, for the prisoner Langford.

[Attornies—*Downes*, and *Mansell*.]

In the ensuing term the case was considered by the

(a) 1 Curw. Hawk. bk. 1, ch. *Harris*, post, p. 661; and *Regina* 28, p. 513. *v. Simpson*, post, p. 669.

(b) See the cases of *Regina v.*

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Judges, who held the conviction right, their Lordships being of opinion that the house was "demolished" within the meaning of the stat. 7 & 8 Geo. 4, c. 29, s. 8, and that in a case of riot, it was a sufficient terror and alarm if *any* of the Queen's subjects being there was terrified.

MONMOUTH ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE CRESSWELL.

MAUND v. THE COMPANY OF PROPRIETORS OF THE MONMOUTHSHIRE CANAL COMPANY.

Where a defendant is entitled to plead not guilty "by statute," he may under that plea go into any defence that could be specially pleaded, whether such defence be founded entirely on the statute, or partly on the statute and partly not, or be a defence wholly independent of the statute.

Trespass will lie against a corporation aggregate for an act done by their agent within the scope of his authority, and in such an action it is not necessary to shew the appointment or authority of the agent under the seal of the corporation.

TRESPASS.—The first count of the declaration stated, that the defendants broke, damaged, and spoiled divers chains with which certain barges or boats were moored, and seized the boats or barges, and broke the helm or rudder of one of the barges or boats, and converted the same to their own use. Second count, that the defendants "took certain goods and chattels of the plaintiff," and converted them to their own use. Pleas—first, to the whole declaration, not guilty "by statute;" and second, to the first count, a plea of payment into Court of 10*l.*, and that the plaintiff had sustained no greater damage. Replication to the second plea, an acceptance of the 10*l.* in full satisfaction of the causes of action in the first count.

It appeared that on the 26th of August, 1841, seven boat loads of coals, together with the boats containing them,

were distrained as they lay in the Monmouthshire Canal for a sum of 82*l.* 13*s.* 1*d.*, the amount of tolls due to the defendants from a person named Davis, and it was proved that on the 5th of September the seven boat loads of coal were sold by the direction of Mr. Cooke, the chief clerk of the company, and that on the 6th the barges were returned empty to the plaintiff.

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Talfourd, Serjt., for the defendants, submitted that a corporation aggregate could not be sued in trespass for an act done by their agent, unless an authority to the agent under the seal of the corporation were given in evidence; and that at all events it was necessary to shew that the agent was appointed by some instrument under seal.

CRESSWELL, J.—I will give you leave to move to enter a verdict for the defendants on this point if the Court above should think it well founded.

Talfourd, Serjt.—I propose to shew that the coals were not the property of the plaintiff, but belonged to a person named Davis, and that they were distrained for tolls due to the company from Mr. Davis, under the 100th section of the Monmouthshire Canal Company's act (a), which empowers the persons who are authorized to receive the tolls to distrain any boat, vessel, or goods for arrears of toll due from the owner of such boat, vessel, or goods.

Ludlow, Serjt., for the plaintiff.—There is no plea that the plaintiff was not possessed.

Talfourd, Serjt.—By the 147th sect. of the Monmouthshire Canal Company's act (b) it is enacted, "that if any action, suit, or information shall be brought or commenced against any person or persons for anything done or to be

(a) 32 Geo. 3, c. 102.

(b) *Id.*

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done in pursuance of this act," "the defendant or defendants in such action or suit shall and may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act."

Ludlow, Serjt.—The question whether these were the plaintiff's coals or not can have no relation to any act of Parliament; and if it was to be denied that these were the plaintiff's coals, the defendants should have pleaded that the plaintiff was not possessed of the coals.

CRESSWELL, J., (having conferred with *Patteson*, J.)—My Brother *Patteson* informs me that fourteen of the Judges had a meeting to settle the question as to what could be given in evidence under the plea of not guilty "by statute;" and he tells me that the majority of the Judges were of opinion that every defence that could be specially pleaded, whether founded entirely on the statute or partly on the statute and partly not, or if it was a defence wholly independent of the statute, (as here, that the property in question was not the property or in the possession of the plaintiff), may be given in evidence under the plea of not guilty "by statute." I shall, therefore, receive the evidence.

The evidence was given.

Verdict for the plaintiff.

Ludlow, Serjt., and *F. V. Lee*, for the plaintiff.

Talfourd, Serjt., *R. V. Richards*, and *Whitmore*, for the defendants.

[Attornies—*Freeman & Co.*, and *Mostyn*.]

In the ensuing term, *Talfourd*, Serjt., applied to the Court of Common Pleas, in pursuance of the leave given at the trial, and obtained a rule to shew cause why the

verdict should not be entered for the defendant, which rule was after argument discharged, the Court being of opinion that an action of trespass was maintainable against a corporation aggregate for the act of their agent, without shewing any appointment or authority of such agent under the seal of the corporation (c).

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(c) As to actions of trover against corporations aggregate, see the case of *Yarborough v. The Bank of England*, 16 East, 6; and as to the indictments against cor-

porations, see the case of *Reg. v. The Birmingham and Gloucester Railway Co.*, 2 G. & D. 236, and 9 C. & P. 469.

REGINA v. BRETTEL.

LARCENY.—The prisoner was indicted for stealing a pig, the property of Thomas Barrett.

When the prisoner was called upon to plead, *Greaves*, who was his counsel, stated that the prisoner had been tried and convicted, and was now suffering the punishment, for stealing another pig of the prosecutor, which was stolen at the same time as the pig which was the subject of the present charge; and he suggested, that although perhaps a plea of *autrefois acquit* could not succeed, yet that this case bore considerable resemblance to that of *Rex v. Jennings* (a),

Where a person stole two pigs belonging to the same person at the same time, and after being convicted and punished for stealing one of the pigs, was again indicted at a subsequent assize for stealing the other: —*Held*, that this might legally be done, but *seemle*, that in such a case the second prosecution ought not to be proceeded with.

(a) R. & R. C. C. 388. In that case the prisoner had been convicted of manslaughter, in killing Mary Cormack, and had received the benefit of clergy for that offence. He was afterwards tried and convicted of manslaughter, in killing Mary Ann Condon, the same act having caused the death of both. Eleven of the Judges held that "the former allowance of clergy protected him from any punishment on the second verdict."

It appears from the short-hand writer's report of the trials (O. B. Sess. Pa. 1816, p. 156, 229), that the prisoner gave a woman named Condon something, which he called composition coal, and that when she put it on the fire it caused an explosion, by which the two children, Mary Cormack and Mary Ann Condon, were so much burnt that they died, but Mary Ann Condon did not die till after the trial of the prisoner for the manslaughter of

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where the death of two persons had been caused by the same act; and the prisoner having been tried and punished for manslaughter in the one case, for killing the one, no judgment was given against him on a second conviction for killing the other.

CRESSWELL J.—It was impossible, there, that the killing of one could be an offence identical with the killing of the other.

Greaves.—That is, therefore, a stronger case than the present; but I have no objection to the prisoner's pleading not guilty, and leaving his case in the hands of the Court.

The prisoner pleaded not guilty.

It was opened by *A. Wood*, for the prosecution, that the pig which was the subject of the present indictment was stolen from the prosecutor at the same time as the pig for the stealing of which the prisoner had been before convicted, but that the former had not been found till after the prisoner had been convicted of stealing the other pig.

Greaves.—I admit that I could not sustain a plea of autrefois acquit, as it is laid down by Lord *Hale* (b), that "it hath happened that a man acquitted for stealing the horse hath yet been arraigned and convict for stealing the saddle, though both were done at the same time." Still I submit that it is a case for the consideration of the Court.

CRESSWELL, J.—I remember a case before Baron *Wood*,

Mary Cormack. This case seems to have been decided on the ground that a party having had the benefit of clergy was thereby discharged for ever of that, and all other felonies before committed by him that

were within the benefit of clergy; but the law on this subject is now entirely altered by the abolition of the benefit of clergy by the stat. 7 & 8 Geo. 4, c. 28, s. 6.

(b) 2 H. P. C. 246.

where a prisoner was tried and acquitted of uttering one forged note, and afterwards indicted for uttering another note, which he had uttered at the same time as the former one ; and Baron *Wood* held that it might be done : but here the prisoner is convicted and is suffering the punishment for stealing one pig, and therefore I think that it would be as well not to proceed with this indictment.

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No evidence was offered.

Verdict—Not guilty.

A. Wood, for the prosecution.

Greaves, for the prisoner.

[Attornies—*T. Addams Williams*, and *Owen*.]

REGINA v. CHARLES JONES.

LARCENY.—The prisoner was indicted for stealing a pig, the property of Robert Baker.

It appeared that on Saturday, the 18th of December, 1841, the prosecutor had employed the prisoner to drive six pigs from Cardiff to Usk fair, which was on the 20th of that month, for which he paid the prisoner six shillings. The prisoner had never before been in the employ of the prosecutor, and had no authority to sell any of the pigs. It appeared that on Sunday, the 19th of December, the prisoner left one of the pigs at Mr. Matthews's, of Coedkernew, to be kept till the next night, saying that it was too tired to walk. On Monday, the 20th, the prisoner told the prosecutor at Usk that he had left the pig at Mr. Matthews's because it

The prisoner, who was not otherwise in the prosecutor's service, was employed by the prosecutor to drive six pigs from C. to U. On the way he left one at Mr. M.'s, stating that it was tired, and he told the prosecutor that he had done so. The prosecutor told the prisoner to go and ask Mr. M. to keep the pig for him. The prisoner went

to Mr. M.'s and sold the pig to Mr. M. :—*Held*, no larceny,

If a person is allowed to have possession of a chattel, and he converts it to his own use, it is not larceny, unless he had an intention of stealing it when he obtained the possession of it, but if he has merely the custody of a chattel, he is guilty of a larceny if he disposes of it, although he did not intend to do so at the time when he received it into his custody.

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was tired ; and the prosecutor then desired the prisoner to call at Mr. Matthews's and ask him to keep the pig for him till the following Saturday, and he would pay him for the keep. On Tuesday, the 21st, the prisoner called at Mr. Mr. Matthews's, and sold the pig to Mr. Matthews for a guinea ; and on Thursday, the 23d, he told the prosecutor that he had seen the pig at Mr. Matthews's, and that Mr. Matthews would keep it till the following Saturday.

CRESSWELL, J.—Is this a larceny ?

Greaves, for the prosecution.—The difficulty is, that the prisoner did not sell the pig at the time he left it, but left it because it was tired, and sold it when it was no longer in his possession.

CRESSWELL, J.—There is no evidence that the prisoner had any intention to steal the pig when he received the six pigs to drive.

Greaves.—I submit that that is not necessary, as the prisoner had merely the custody of the pigs, and that if he had sold one of the pigs on the road it would have been larceny. In the case of *Rex v. M'Namee* (a) it was held, that if a man who is hired to drive cattle sell them it is a larceny, although it be found by the jury that he did not intend to steal the cattle at the time he took them into his charge, because he has only the custody of the cattle, and not the right of possession. So in the case of *Regina v. Harvey* (b), where the owner of goods employed a person not in his service to take them to a particular place, shew them to a customer, and bring them back, but did not authorize him to sell them or leave them with the customer, and he, instead of taking the goods to the place specified, sold them for his own advantage ; it was held that this was

(a) M. C. C. 363.

(b) 9 C. & P. 353.

a larceny, as he had the custody, and not the possession of the goods.

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CRESSWELL, J.—The Judges appear to have acted lately on a very nice distinction. If a man is allowed to have the *possession* of a chattel and he converts it to his own use, it is not larceny, unless he had an intention of stealing it when he obtained the possession of it, but if he has merely the *custody* of a chattel, he is guilty of a larceny if he disposes of it, although he did not intend to do so at the time when he received it into his custody. Here, it appears, that the prisoner left the pig on Sunday, the 19th, and if nothing more had appeared, I should have held that Matthews kept it merely for the prisoner; but on Monday, the 20th, he told the prosecutor that he had left it there, and the prosecutor told him to ask Matthews to allow the pig to remain there till the Saturday. The prosecutor thus consented to Matthews being the keeper of the pig for him, and therefore his custody became the custody of the prosecutor, and then the prisoner goes and sells the pig to Matthews (a). I think that the prisoner must be acquitted.

Verdict—Not guilty.

Greaves, for the prosecution.

[Attorney—*T. Jones Phillips*.]

(a) See the cases of *Regina v. Beaman*, ante, p. 595; and *Regina v. Goode*, ante, p. 582; *Regina v. Evans*, post, p. 632.

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REGINA v. THOMAS JONES.

In a case of bigamy, it appeared that the prisoner's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and that she had never heard of the first wife, who it appeared had been living seventeen miles from where the prisoner resided:—*Held*, that on this evidence the prisoner ought to be acquitted on the proviso contained in the 22nd sect. of the stat. 9 Geo. 4, c. 31.

BIGAMY.—The prisoner was indicted for marrying Sarah Adams, his former wife, Ann Jones, being alive.

It was proved that the first marriage was in the year 1812, and the second in the year 1841.

It appeared that the prisoner had lived for about twelve years with his first wife, and that she left him sixteen or seventeen years before the second marriage; and it was proved by the second wife that she had known the prisoner for about ten years, living in service as a single man, and that she never knew or heard that he had a former wife, It appeared that the first wife, after leaving the prisoner, went and lived at Abergavenny, which was seventeen or eighteen miles from the place at which the prisoner lived.

CRESSWELL, J.—I think that the prisoner must be acquitted. By the 22nd section of the stat. 9 Geo. 4, c. 31, it is provided that nothing in that act contained, as to the offence of bigamy, shall extend “to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time.” Here, it appears, that the prisoner's wife has been absent sixteen or seventeen years, and living seventeen or eighteen miles from the prisoner, which is much further than a person in his situation would go, and the second wife has proved that she never knew or heard of a former wife. There is no proof that the prisoner knew that his first wife was living, and in the absence of that proof, I think he comes within the proviso.

Verdict—Not guilty.

Greaves, for the prosecution.

[Attorney—*T. Jones Phillips*.]

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GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PATTESON.

DOE, on the Demise of MORSE, v. WILLIAMS.

EJECTMENT to recover a house and premises situate at Alvington.

On the part of the plaintiff a conveyance, dated in the year 1819, from John Williams, the late husband of the defendant, was put in, which recited that a term of 1500 years had been granted to Thomas Morse by way of mortgage, and that in consideration of £170, the mortgage-money, and £30 interest due, John Williams granted the premises in fee to Thomas Morse. It appeared that John Williams and his wife (the defendant) and Walter Williams, their son, all resided in the house till the death of John Williams in 1837; and that the defendant and Walter Williams had continued to reside there ever since. It was proved that, in the year 1836, a person, who was called as a witness, had received a paper from John Morse, the lessor of the plaintiff, who was the heir and devisee of Thomas Morse (who was then dead), and that the witness had made a copy of the paper, which copy he delivered to Walter Williams and at the same time seized some casks of cider which were on the premises now sought to be recovered. It was proved, that search had been made for the paper delivered by John Morse to the witness, and that it could not be found.

A person who made a distress received a paper from the person by whose authority he distrained, and made a copy of it, which he gave to the person distrained on. The original was lost:—*Held*, that parol evidence might be given of its contents, without producing or accounting for the copy given to the party distrained on.

A mother and son were in possession of a house, for which house a declaration in ejectment was served on the son, who let judgment go by default, and also on the mother who defended:—*Held*, that on the trial of the ejectment against the mother, an examined copy of a judgment, recovered against the son by

Greaves, for the plaintiff, proposed to give parol evidence of its contents.

the lessor of the plaintiff for use and occupation of the house, was not receivable in evidence.

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Ludlow, Serjt.—I submit that that cannot be done, and that the copy delivered by the witness to Walter Williams must be accounted for before any parol evidence can be given.

Greaves.—If secondary evidence of the contents of a document be admissible at all parol evidence is admissible. It was held, in the cases of *Brown v. Woodman* (a) and *Doe d. Gilbert v. Ross* (b), that there are no degrees in secondary evidence. I submit that, if secondary evidence be admissible at all, it may be given by parol, even in cases where an attested copy of the document is in existence.

PATTESON, J.—I think that the evidence is receivable (c).

The evidence was given, and it appeared that the paper was an authority signed by the lessor of the plaintiff to distrain on the goods of Walter Williams, for £13 for rent of the premises in question.

It appeared that a declaration in ejectment for these premises had been served on Walter Williams at the same time that the declaration in the present ejectment had been served on the defendant; and that he had let judgment go by default.

Greaves, for the plaintiff, proposed to put in an examined copy of a judgment recovered by the lessor of the plaintiff against Walter Williams, for use and occupation of these premises.

Ludlow, Serjt.—As Walter Williams is no party to this action, I submit that a judgment against him is not receivable in evidence against the present defendant.

(a) 6 C. & P. 206.

(b) 7 Mee. & W. 102.

(c) At the end of the case the

learned Judge gave *Ludlow*, Serjt., leave to enter a nonsuit on this point, but no motion was made.

PATTISON, J.—I think it is not receivable.

The evidence was rejected.

Verdict for the plaintiff.

Greaves and *G. Jones*, for the plaintiff.

Ludlow, Serjt., for the defendant.

[Attornies—*Croome & Son*, and *Hulls*.]

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REGINA v. GEORGE PURCHASE.

EMBEZZLEMENT.—The indictment stated that the prisoner, on the 15th day of November, 1841, at &c., was servant of Henry Hodges, and did then and there, by virtue of his employment, *receive* the sum of 2*l.* 1*s.* 6*d.* on account of his master, and that the said G. P. afterwards, and within the space of six calendar months, to wit, on the 16th day of November, in the year aforesaid, did *receive* the further sum of 2*l.* 3*s.* on account of his master; and that the said G. P. afterwards, and within the space of six calendar months from the day first aforesaid, to wit, on the 17th day of November, in the year aforesaid, did *receive* the further sum of 2*l.* 1*s.* on account of his master; and that the said G. P. "*on the several days aforesaid*, in the year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, the said several sums of money, respectively received by him on each of those days as aforesaid, feloniously did embezzle." And so the jurors do say that the said G. P. in manner and form aforesaid feloniously did steal the said several sums of money, against the form of the statute, &c.

An indictment for embezzlement, which charges in one count that within six calendar months the prisoner *received* three sums, laying a day to the receipt of each, and that, "on the several days aforesaid," the prisoner embezzled these sums, is bad, because it does not shew that the sums were *embezzled* within six months of each other; and this objection ought to be taken on demurrer.

Whether three acts of embezzlement can be charged in *one count* in an indictment, *quære*; but the

correct course is to put each charge of embezzlement into a separate count.

Where a prisoner in a case of felony has in the absence of his counsel pleaded to an indictment which is objectionable on demurrer, the Judge will, on the application of the prisoner's counsel, allow the prisoner to demur before the evidence is gone into.

In a case of embezzlement, if the prisoner demurs to the indictment, and the demurrer be decided against him, he may still plead over to the felony and take his trial.

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The prisoner had pleaded to this indictment.

Greaves, for the prisoner, stated that he had not seen the indictment before the prisoner had pleaded to it, and he proposed to take objections to it before the evidence was gone into.

PATTERSON, J.—I think that you ought to demur or move in arrest of judgment as to any defects on the face of the record. Objections of that kind cannot properly be considered on a case reserved for the opinion of the Judges, as some of them may be afterwards called upon to decide the question upon a writ of error.

Greaves.—Cases have on some occasions been reserved, where the objection has appeared on the face of the record—of which the case of *Rex v. Birchenough* (a) is an instance; but in other cases the Judges would not, upon a case reserved, go into objections that were on the face of the record (b). It is not easy to discover how cases first came to be reserved for the opinion of the Judges; but the earliest reserved cases which are reported seem to have been so reserved by consent of both sides, and some of the earliest are cases on special verdicts, which were argued before all the Judges by consent.

PATTERSON, J.—Although the Judges are consulted, the judgment is merely that of the single Judge who tried the prisoner (c).

Greaves.—Some doubt may perhaps exist as to whether

- (a) M. C. C. 477. There the prisoner had pleaded in bar of an indictment which charged him with a felony, as accessory before the fact, that he had been acquitted on an indictment which charged him as an aider and abettor in the felony, and the Judges held that this was not a good plea in bar to the second indictment.
- (b) See the case of *Reg. v. Overton*, post, p. 655.
- (c) See the case of *Rex v. Parry*, 7 C. & P. 836.

the prisoner could plead over to the felony in this case, if the demurrer be decided against him.

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PATTESON, J.—I think that there is no doubt that the prisoner may plead over to the felony, if the demurrer be decided against him.

Greaves.—Will your Lordship allow me, on the part of the prisoner, to demur now?

PATTESON, J.—I have conferred with my Brother *Cresswell*, and we think that you ought to take the objection by demurrer.

Greaves, for the prisoner.—I shall demur: and I submit that on demurrer this indictment is bad,—first, because it charges three offences in one count. It is clear, that, at common law, that would be a fatal objection; and the stat. 7 & 8 Geo. 4, c. 29, s. 48, only authorizes the insertion of three offences in the same *indictment*, and that must be in the ordinary course by inserting three counts. Secondly, I submit that it does not appear by this indictment that the three offences were committed within six calendar months; for, although it is alleged the money was *received* within six calendar months, there is no allegation that it was *embezzled* within six calendar months; and the allegation, that the money was embezzled “on the several days aforesaid,” would be proved by shewing an embezzlement at any time: in declarations in limited jurisdictions, wherever time and place are alleged, there is an allegation “within the jurisdiction aforesaid;” and so here it ought to have been expressly alleged that the *embezzlement* was within six calendar months. Thirdly, the indictment charges a *joint* stealing on three several and different days.

A. M. Skinner, for the prosecution.—I submit that the indictment is sufficient. It is like the case of larceny,

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where the taking of several chattels is included in the same count of the indictment.

Greaves.—In larceny you can only charge in one count the taking of goods which are all stolen at the same time. The legislature must be taken to have used the word “indictment” in its correct legal signification, and would have used the word “count” if they had intended three charges to have been inserted in the same count.

PATTESON, J.—It is clear that this indictment is bad at common law; for although you might charge twenty felonies in the same indictment, and there would be no ground of demurrer on account of such joinder, yet a practice has prevailed, where there is more than one felony charged in an indictment, to make the prosecutor elect on which he will proceed. This indictment would be bad, not on the ground that three separate felonies are included in one count, but on the ground that the words “against the form of the statute” cannot be applied to one charge any more than to another. I was of that opinion in the case of *Regina v. Jeyes*, tried before me at Warwick. Then if the indictment is bad at common law, the question is, whether it is good under the stat. 7 & 8 Geo. 4, c. 29. In the case of *Regina v. Jeyes* there was no allegation that the subsequent offences were committed within six calendar months of the first offence, and I held that it was necessary to allege that all the three offences were committed within six calendar months. The question then is, whether that averment is contained in the present indictment. The words of the 48th sect. of the stat. 7 & 8 Geo. 4, c. 29 are, that “it shall be lawful to charge in the indictment and *proceed* against the offender” for three offences. It may be argued that the words “to proceed” are the effective words of the act, and were pointed at the previous practice. I am not at all sure that it may have been intended to allow three distinct acts of

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embezzlement to be charged in one and the same count, but for the purpose of this argument I will assume that that may have been so. Now here the words "within six calendar months" are inserted in this indictment; but if we look at the act of Parliament, the offence is not the *receipt* of the money but the *embezzlement* of it, and there must be some averment that the three acts of *embezzlement* were within six calendar months. Now in this indictment these expressions are pointed only to the *receipt* of the money; and unless the words, that the prisoner "on the several days aforesaid" embezzled the three sums, confine the prosecutor to prove the three acts of embezzlement within six calendar months, I do not see how this indictment can be sustained. Now, do these words tie up the prosecutor so that he could not succeed unless he proved that the three embezzlements were within six calendar months? It is clear, that, if the money was received in 1840 and embezzled in 1841, more than six months afterwards, the prisoner might be convicted on this indictment. There is nothing to prevent evidence being given of the monies having been received early in 1840, and an embezzlement then, and another embezzlement in the month of January, 1841, and a third in October following. I think therefore the indictment is bad, and my Brother *Cresswell* agrees with me in that opinion. It is the safest course to have three separate counts; because, even if there were no allegation of their being within six calendar months, the only effect would be that the prosecutor would be put to his election. The prisoner must be dismissed, and discharged from this indictment.

Demurrer allowed.

A. M. Skinner, for the prosecution.

Greaves, for the prisoner.

[Attornies—*Beaton*, and *Broune*.]

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(Crown Side.)

BEFORE MR. JUSTICE CRESSWELL.

REGINA v. OSBORNE.

In a case of rape, a person to whom the prosecutrix made a complaint very recently after the offence, as she was on her way home, may be asked whether she named "a person" as having committed the offence, but not *whose name* she mentioned.

RAPE.—The prisoner was indicted for ravishing Eliza Juggins.

From the evidence of the prosecutrix it appeared that very soon after the commission of the offence, and as she was returning home, she had complained to Mrs. Partridge: and to confirm this part of the case Mrs. Partridge was called, and *Cripps*, for the prosecution, asked her whether the prosecutrix made any complaint, and was directed to answer "yes" or "no;" and on her answering "yes," she was then asked whether the prosecutrix named any particular person.

Greaves, for the prisoner.—If that question be guarded by directing the witness to answer "yes" or "no," it is unobjectionable.

CRESSWELL, J., directed the witness to answer "yes" or "no."

The witness answered "yes;" and *Cripps* then proposed to ask her whose name was mentioned by the prosecutrix.

Greaves.—I submit that the question cannot be put. The name is one of the particulars of the prosecutrix's complaint, and the rule is, that the *fact* of a complaint having been made is evidence, but not the *particulars* of it. The fact of the complaint is admissible, as shewing that the prosecutrix was then a complaining party; and it is only for the purpose of corroborating her that the complaint is evidence at

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all: and it was so laid down by Baron *Parke* in the case of *Regina v. Gutteridge (a)*. And in the case of *Rex v. Wink (b)*, it was held by Mr. Justice *Patteson*, that a person who had been robbed might be confirmed as to the *fact* of a complaint by the evidence of a constable to whom he made it, but that the constable could not be asked what the name of the person was whom the prisoner had mentioned. The name is not only a particular, but in some cases (as where the question turns on identity) a most important particular of the prosecutrix's statement.

Cripps, for the prosecution.—I submit that this complaint is receivable in evidence as part of the *res gestæ*. The complaint was made very soon after the offence was committed, and as the prosecutrix was on her way home. If the complaint had been made at the place at which the offence occurred it would have been clearly evidence as part of the *res gestæ (c)*.

CRESSWELL, J.—The distinction is perhaps rather fine, but I think that the case of *Aveson v. Kinnaird (d)* is not applicable to the present case, and that this statement of the

(a) 9 C. & P. 471.

(b) 6 C. & P. 397.

(c) See the case of *Rex v. Foster*, 6 C. & P. 325.

(d) 6 East, 188. In that case, which was an action by a husband on a policy of insurance on the life of his wife, declarations of the wife, made by her when lying in bed, apparently ill, stating the bad state of her health at the period of her going to Manchester (whither she went a few days before, in order to be examined by a surgeon, and to get a certificate from him of good health, preparatory to the making of the insurance) and her apprehensions that she could not live ten

days longer, by which time the policy would be returned, were held to be admissible in evidence to shew her opinion, who best knew the fact of the ill state of her health, at the time of effecting the policy, which was on a day intervening between the time of her going to Manchester and the day on which such declarations were made; and particularly after the plaintiff had called the surgeon as a witness to prove that she was in a good state of health when examined by him at Manchester, his judgment being formed in part from the satisfactory answers given by her to his inquiries.

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prosecutrix does not form part of the *res gestæ*. If the prosecutrix had been under suffering, a surgeon might have examined her ; and this state of her feelings might be evidence, but what she said about another person would stand on very different ground. What the prosecutrix said at the time of the committing of the offence would be receivable in evidence on the grounds that the prisoner was present and the violence going on ; but if the violence was over and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence. I think that the case of *Rex v. Wink* is a direct authority on the point ; but I own that my mind is not convinced as to the latter part of the case, as it seems to me to be rather too refined a distinction to prevent the name from being mentioned, and yet to permit it to be asked whether, in consequence of what was said, the witness apprehended a particular person. I think you ought not to go so far as that ; and that the question, " whose name was mentioned," ought not to be asked.

The question was not put.

Verdict—Guilty.

Cripps, for the prosecution.

Greaves, for the prisoner.

[Attornies—*Lediard*, and *Smallridge*.]

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REGINA v. MACARTHY.

MURDER.—The prisoner was indicted for the wilful murder of William Edward Hopper.

C. Watson, for the prisoner, moved to postpone the trial on an affidavit, which stated that a witness who was present at the transaction, and who was bound over to appear at these assizes and give evidence against the prisoner, was not in attendance, and that it was material for the prisoner that this witness should be cross-examined by the prisoner's counsel. The affidavit did not state that any endeavour had been made on the part of the prisoner to procure his attendance.

Greaves, for the prosecution, stated that it was not known where the witness was, and that on the part of the prosecution inquiries had been made for him, but in vain.

CRESSWELL, J. (having conferred with *Patteson*, J.)—I at first inclined to think that there was no ground for postponing this trial, as no one on the part of the prisoner had done any thing in order to secure the attendance of this witness; but upon my conferring with my Brother *Patteson*, he pointed out to me that the witness having been bound over to appear here, the prisoner might reasonably expect that he would appear, and we are both of opinion that it was therefore not necessary that the prisoner should have endeavoured to procure the attendance of the witness. The trial must therefore be postponed.

A prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes, was absent, and that on cross-examination that witness could give material evidence for the prisoner:—*Held*, that this was sufficient ground for postponing the trial without shewing that any endeavour had been made on the part of the prisoner to procure the witness's attendance, as the prisoner might necessarily expect, from his having been bound over, that he would appear.

Trial postponed.

Greaves, for the prosecution.

C. Watson and *A. M. Skinner*, for the prisoner.

[Attornies—*Bush*, and *Day*.]

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HOME CIRCUIT, 1842.

SURREY SPRING ASSIZES, 1842.

BEFORE MR. BARON ALDERSON.

DIRKS v. RICHARDS.

A. left a picture, which was his property, in the rooms of C., who was an auctioneer. B. was in company with A. when he went to C.'s rooms with the picture. B. owed C. £8, and had advanced A. some money upon the picture in question. When A. wanted his picture back again and offered to pay for the warehouse room, C. said, the cost of keeping the picture was 5s., but that he would not deliver it up unless he was paid B.'s debts in addition to that sum:—*Held*, a waiver of the demand for warehouse-room, and that detinue would lie by A. against C. for the value of the picture, without any further offer to pay for the cost of keeping it.

DETINUE for a picture. Plea, Non detinet, and that the plaintiff was not possessed &c.

It appeared that in the month of June, 1841, the plaintiff, in company with a friend of his, (A. B.), took the picture to the defendant, who was an auctioneer, and A. B. said that the plaintiff wished to leave it there for a short time, and it was left accordingly, with the consent of the defendant. In June the plaintiff wished to have it back, and offered to pay for the warehouse-room, which the defendant said was 5s., but he did not demand any sum. Subsequently, on some dispute arising as to sending the picture home, the plaintiff wrote a formal request for it, and received an answer that the defendant would not deliver it up until £8 owing to him from A. B. were repaid. There was evidence, on the part of the defendant, that the plaintiff had said that A. B. had advanced him (the plaintiff) £10 upon the picture; and also that A. B. had said at the auction-rooms that the picture was his own.

ALDERSON, B., in summing up.—There are two questions in this case: first, who had the property in the article, the plaintiff or his friend; and secondly, whether there was any illegal detention of it by the defendant. The evidence as to the property being in the plaintiff does not appear to be much contradicted by the defendant's witnesses. Then as

to the detention. If the defendant had refused to deliver up the picture unless the warehouse-room for it were paid, he was justified in his refusal; but he does not do so. The plaintiff offers to pay what the defendant should demand for that. The defendant makes no demand, but refuses to return the painting unless £8, due from another person, were paid him. This seems to me a waiver of any other demand for warehouse-room, and I think, therefore, that the subsequent detention was illegal.

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Verdict for plaintiff, 52*l.* 10*s.* for the value of the picture, and 1*s.* damages (*a*).

(*a*) The cases which bear on this point are those of *Scarfe v. Morgan*, 4 M. & W. 270; *Boardman v. Sill*, 1 Camp. 410, n.; and *Knight v. Harrison* (a MS. case, K. B., 10 Dec. 1823, reported in Saunders on Pleading and Evidence, p. 641). *Boardman v. Sill* was an action of trover, for brandy which was deposited in the defendant's cellars, and which, when demanded, he had refused to deliver up, saying it was his own property. At that time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. Lord *Ellenborough*, C. J., was of opinion that, as the brandy had been detained on a different ground to that of no tender for the warehouse-room, and as there had been no demand of warehouse rent, the defendant must be taken to have waived his lien. In *Knight v. Harrison*, as cited in *Scarfe v. Morgan*, the plaintiffs brought trover for 100 pieces of calico; the defendant was a commission agent at Manchester, and bought, as agent of Moravia & Co., London, of the plaintiffs at Manchester, 1500 pieces of calico,

to be paid for by a bill drawn by the plaintiffs on Moravia & Co. The calico was delivered to the defendant on the 2nd of October; on the 4th of October, Moravia & Co. stopped payment. The plaintiffs applied to the defendant for the goods then in his hands, and the defendant, at first, promised to return them, they not having been drawn for, but he afterwards said he would not deliver them, as it was doubtful whether he could safely do so. The plaintiffs obtained an order from Moravia & Co., and shewed the order to the defendant, on which he said he would not give up the goods until Moravia & Co. had paid his *general balance*, the amount of which he did not state. The plaintiffs demanded the goods, and tendered an indemnity, but the defendant refused to accept it. It was contended for the defendant, first, that he had a general lien for his whole balance; secondly, that he had a lien for £49, the amount of expenses incurred by him in getting the goods glazed: but *Abbott*, C. J., said—"The defendant had no lien for his general balance as against the plaintiffs, since, at the time of the

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Platt and Hance, for plaintiff.

Thesiger and Montagu Chambers, for defendant.

[Attornies—*F. B. Smith*, and *Hembery*.]

Afterwards the Court of Common Pleas was moved for a new trial, and the rule was refused. It was said by

MAULE, J.—“The defendant’s conduct amounts to saying, “I do not recognize you as the person who deposited the picture with me; if I did I should only charge for the warehouse-room, but the picture came here from Mr. A. B. He thus sets up a claim inconsistent with the claim of the plaintiff. This is clearly a waiver of his lien with respect to the plaintiff.”

demand, he insisted on having his general balance, and did not name his particular lien, but made too large a claim: he is precluded from setting it up now, for if he had relied upon that now, it is most probable the plaintiff would have paid it.”

SUSSEX SUMMER ASSIZES, 1842.

(*Civil Side*.)

BEFORE LORD ABINGER, C. B.

REGINA v. REUBEN MARNER.

An insolvent,
 wilfully and
 fraudulently
 omitting sums

of money from his special balance sheet, is not guilty of a misdemeanor under the 99th sect. of the stat. 1 & 2 Vict. c. 110, as that enactment only applies to cases where the omission would affect the interest of creditors, and not where it is an omission of money received and subsequently expended by the insolvent.

INDICTMENT against the defendant, on the 99th sect. of the stat. 1 & 2 Vict. c. 110 (a), for wilfully omitting a

(a) The act for abolishing arrest on mesne process in civil actions, except in certain cases.

sum of money from his schedule. The indictment charged that the defendant was a prisoner for debt, in actual custody within the walls of the gaol of Horsham, and being so, he signed a certain petition to the Court for the Relief of Insolvent Debtors in England for his discharge; "and that the said R. M., so being and continuing such prisoner as aforesaid, afterwards, to wit, on the 15th day of June, in the year aforesaid, at Horsham aforesaid, in the county aforesaid, signed a certain schedule, purporting to contain, amongst other things, a full, true, and perfect account of all his estate and effects, real and personal, in possession, reversion, remainder, and expectancy, and purporting, also, to contain a balance sheet of so much of his receipts and expenditures, and of the items comprising the same, as was required by the said Court for the Relief of Insolvent Debtors in that behalf;" and that the defendant filed his petition in the Insolvent Debtors' Court; and that on the 18th of June, 1841, a certain order of the said Court "was duly made, vesting all the real and personal estate and effects of the said R. M., both within this realm and abroad, except the wearing apparel, bedding, and other such necessaries of him, the said R. M., and his family, and the working tools and implements of him, the said R. M., not exceeding, in the whole, the value of £20, in Samuel Sturgis, of Lincoln's-Inn-Fields, in the county of Middlesex, gentleman, provisional assignee of the estates and effects of insolvent debtors in England, his successors and assigns." And "that at a certain Court for the Relief of Insolvent Debtors, holden, to wit, on the 17th day of July, 1841, to wit, at Horsham aforesaid, in the county aforesaid, before T. B. B., Esq., then being one of the commissioners of the said Court for the Relief of Insolvent Debtors, the said R. M., so being and continuing such prisoner as aforesaid, then and there came before the said T. B. B., so being such commissioner as aforesaid, to be dealt with according to the provisions of the statute in such case made and provided; and, on that occasion, the said

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schedule was then and there produced and shewn to him, the said R. M., and he, the said R. M., was duly sworn and did take his corporal oath upon the holy Gospels of God, before the said T. B. B., so then being such commissioner as aforesaid, and having, as such commissioner as aforesaid, competent power and authority to administer the said oath to the said R. M. in that behalf, that the contents of that his, the said R. M.'s, schedule, and all and every part thereof respectively, were true. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said R. M., not regarding the statute in such case made and provided, and with intent to defraud the creditors of him, the said R. M., did, to wit, on the day and year last aforesaid, at Horsham aforesaid, in the county aforesaid, wilfully and fraudulently omit in his said schedule, so sworn to as aforesaid, certain effects of him, the said R. M., that is to say, a certain sum of 57*l.* 14*s.* 5*d.*, being the amount of a certain cheque, made and drawn by G. T. P., Esq., on Messrs. C. & Company, of No. 8, Austin-Friars, London, for payment of the sum of 57*l.* 14*s.* 5*d.* to the said R. M. or bearer on demand, and which said sum of money was received by him, the said R. M., on the 6th day of October, 1840: a certain other sum of 15*l.* 15*s.*, received by the said R. M. of one W. P. on the 24th day of October, 1840: a certain other sum, &c., [stating each sum, and from whom and when received], against the form of the statute in such case made and provided. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said R. M. did, to wit, on the day and year last aforesaid, at Horsham aforesaid, in the county aforesaid, with intent to defraud his creditors, wilfully and fraudulently omit in his said schedule, so sworn to as aforesaid, the said several sums of money hereinbefore mentioned to have been received by him, in contempt of our Lady the Queen," &c., against the form of the statute &c.

It was opened by *Creasy*, for the prosecution.—That

the omissions which were charged against the defendant were those of certain sums of money which had been received by him prior to the date of the vesting order, and which, in accordance with the 69th section of the stat. 1 & 2 Vict. c. 110, should have been inserted in the special balance sheet which had been filed by the defendant: there, however, they had been omitted. He submitted, that the special balance sheet, by the very terms of the statute, constituted a part of the schedule (the truth of which, and of every part of which, the defendant had verified upon oath); and he submitted, therefore, that the omissions (if wilful and fraudulent) rendered the insolvent indictable for a misdemeanor, under the 110th section of the statute.

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Lord ABINGER, C. B.—I do not think this indictment will lie under the circumstances. The special balance-sheet is (as it were) a mere memorandum of the insolvent's receipts and disbursements for the guidance of the Court, and a man should not be held thus criminally responsible for errors therein. The consequence of such an interpretation of the 110th section, as would be necessary for the purposes of this prosecution, would be to make a highly penal clause apply to cases possibly of no intentional fraud, and of comparatively trifling inaccuracy. The section appears to me to apply to cases only where the omission would affect the interests of creditors, and not where it is a mere omission of money received and subsequently expended by the insolvent. I think that the defendant must be acquitted.

Verdict—Not guilty.

Creasy, for the prosecution.

Shee, Serjt., and *J. J. Johnson*, for the defendant.

[Attornies—*F. A. Lock*, and *G. R. Goodman*.]

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 OXFORD SUMMER CIRCUIT, 1842.

BEFORE LORD CHIEF JUSTICE TINDAL AND MR. JUSTICE
ERSKINE.

ABINGDON ASSIZES.

(Crown Side.)

 BEFORE MR. JUSTICE ERSKINE.

REGINA v. CHARLES EVANS.

A. delivered a waistcoat to the prisoner to take to E. R. to be washed. The prisoner delivered it to E. R. as his own. E. R. having washed it returned it to the prisoner, who converted it to his own use. The Judge left it to the jury to say, whether the prisoner, at the time he received the waistcoat from A., had an intention of stealing it, for that it was no larceny if at that time he had not an intention of stealing it.

LARCENY.—The prisoner was indicted for stealing a waistcoat, the property of Joseph Johnson.

It was proved by the prosecutor, that he, on the 31st of May, 1842, gave the waistcoat into the hands of the prisoner to take to Eliza Rose to have it washed; and it was proved by Eliza Rose that the prisoner brought the waistcoat to her to be washed, at the same time telling her it was his own; and she further stated that she washed the waistcoat and delivered it to the prisoner on the 5th of June; and it was also proved that the prisoner, when he was apprehended, told the constable where to find it.

Tyrwhitt, for the prosecution, referred to 3 Inst. 107 (a).

(a) Lord *Coke* there lays down, that, "if a bale or pack of merchandize be delivered to one to carry to a certain place, and he goeth away with the whole pack, this is no felony; but if he open the pack and take any thing out *animo furandi*, this is larceny. Likewise if the carrier carry it to the place

appointed, and after take the whole pack *animo furandi*, this is larceny also; for the delivery had taken its effect, and the privacy of the bailment is determined." See the cases of *Reg. v. Goorde*, ante, p. 582; *Reg. v. Beaman*, ante, p. 595, and *Reg. v. C. Jones*, ante, p. 611.

ERSKINE, J.—I think that the prisoner's getting back the waistcoat from Eliza Rose was no larceny, because he delivered it to her as his own; he must, therefore, be taken to have converted it to his own use before he delivered it to her. There is, however, one question on which the case must go to the jury.

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The prisoner was called on for his defence.

ERSKINE, J., left it to the jury to say whether the prisoner, at the time when he received the waistcoat from the prosecutor, had an intention of stealing it, for that if, at that time, he had not an intention of stealing it, he was entitled to be acquitted.

Verdict—Not Guilty. The foreman of the jury adding,—“We find that the prisoner had no intention to steal the waistcoat at the time when he received it from the prosecutor.”

Tyrwhitt, for the prosecution.

[Attorney—*Roberts*.]

1842.

WORCESTER ASSIZES.

(Crown Side.)

BEFORE LORD CHIEF JUSTICE TINDAL.

REGINA v. GIDDINS and Two Others.

An indictment for robbery, which charges the prisoners with having assaulted G. P. and H. P., and stolen 2s. from G. P. and 1s. from H. P., is correct, if the robbing of G. P. and H. P. was all one act; and if it were so, the counsel for the prosecution will not be put to elect.

ROBBERY.—The indictment, which consisted of only one count, charged the four prisoners with assaulting George Pritchard and Henry Pritchard, and stealing from George Pritchard two shillings, and from Henry Pritchard one shilling and a hat, on the 14th of May, 1842, at Old Swinford.

It appeared, at the time of the transaction, George and Henry Pritchard were walking together, when the prisoners attacked and robbed them both.

F. V. Lee, for the prisoners, submitted that the counsel for the prosecution should be put to elect which he would go upon, as the assaulting and robbing George Pritchard and the assaulting and robbing Henry Pritchard were distinct felonies.

TINDAL, C. J.—I think that the counsel for the prosecution is not to be put to elect. It is all one act and one entire transaction: the two prosecutors were assaulted and robbed at one and the same time; and there was no interval of time between the assaulting and robbing of the one and the assaulting and robbing of the other. If there had been, the felonies would have been distinct; but that is not so in the present case.

The counsel for the prosecution was not put to his elec-

tion, and evidence was given as to the entire transaction.

The jury found all the prisoners Guilty.

Whitmore, for the prosecution.

F. V. Lee, for the prisoners.

[Attornies—*Roberts*, and *Corser*.]

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GIDDINS.

(Civil Side.)

BEFORE MR. JUSTICE ERSKINE.

GRESWOLDE v. KEMP.

DEBT, on the stat. 2 & 3 Edw. 6, c. 13, for the treble value of predial tithes not set out. Plea, Nil debet, "by statute" (a).

On the trial of an action of debt for the treble value of predial tithes, the plaintiff had

proved the defendant's occupation of the land, the subtraction of the tithe, its single value, and that tithe had been previously paid in respect of land encroached from the same common.

The defendant called witnesses to prove exemption from tithe by reason of the barrenness of the land:—*Held*, that although in the re-examination of a witness for the plaintiff, a question had been asked as to the fertility of the land, the plaintiff was entitled to adduce evidence in reply to disprove the defence.

Where copies of a private act of Parliament, printed by the Queen's printer, are made evidence, a defendant's counsel at *Nisi Prius* cannot make an objection founded on that act a ground of an application for a nonsuit, if the act has not been given in evidence on the part of the plaintiff, because it is not an act to be "judicially noticed," and is only before the court when given in evidence.

(a) By the stat. 21 Jac. 1, c. 4, s. 4, in any action against any person for any offence against the form of any penal law, defendants may plead the general issue that they are not guilty, or that they owe nothing, and give special matter in evidence; and in the case of *Earl Spencer v. Swannell*, 3 Mee. & W. 154, it was held that an action of debt on

the stat. 2 & 3 Edw. 6, c. 13, for the treble value of predial tithes not set out, was a penal action within the stat. 21 Jac. 1, c. 4, s. 4; and that the new rules of pleading not applying to such cases, the plea of nil debet is still a good plea in such an action. See the case of *Maund v. Monmouthshire Canal Co.*, ante, p. 606.

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It appeared that the tithes not set out had arisen in the year 1840, from lands first cultivated in that year after they had been inclosed from Yardley Wood Common; and on the part of the plaintiff evidence was given of the defendant's occupation of the lands, and of his taking off the crop without setting out the tithe, and that the single value of the tithe was 4*l.* 13*s.* 4*d.* It was also proved, on the part of the plaintiff, that tithe had been paid in respect of lands encroached from the same common when it was inclosed. And some of the plaintiff's witnesses were cross-examined as to the land on which the defendant's crop grew having been barren; upon which, in re-examination, some questions were put as to its fertility.

R. V. Richards applied to the learned Judge to nonsuit the plaintiff, on the ground that the land in question had been part of Yardley Wood Common, which had been inclosed under a private Act of Parliament, 3 Will. 4, c. xvii, and he proposed to shew, that, by the provisions of that act of Parliament, the tithes were commuted.

Ludlow, Serjt., *Tyrwhitt*, and *Selfe*, for the plaintiff.—That act of Parliament cannot be made a ground of nonsuit, as it is not in evidence. It is not a local and personal act of Parliament, to be “judicially noticed” (*b*), but a private act, in which it is enacted (*c*), “that this act shall be printed by the several printers to the King’s most excellent Majesty duly authorized to print the statutes of the United Kingdom; that a copy thereof, so printed by any of them, *shall be admitted as evidence thereof* by all judges and justices.”

ERSKINE, J.—I cannot entertain the argument for a nonsuit, as this act of Parliament is not in evidence.

(*b*) See the case of *Forman v. Dawes*, ante, p. 127.

(*c*) By sect. 73.

On the part of the defendant, witnesses were called with a view of shewing that the land was "barren," and thus exempt from tithe, under the 5th section of the stat. 2 & 3 Edw. 6, c. 5.

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In answer to this defence, *Ludlow*, Serjt., for the plaintiff, proposed to adduce evidence in reply.

R. V. Richards, for the defendant.—A plaintiff cannot divide his evidence which is to answer the defendant's case, he must give it all in the first instance, or abstain from giving any in the first instance, and adduce the whole of it as evidence in reply: that was held in the case of *Browne v. Murray* (d). Here, the plaintiff's counsel, in the re-examination of their witnesses, asked some questions as to the fertility of the land, and the plaintiff, having elected to enter on that part of his case by anticipation, cannot now go into the rest of it in reply to the defendant's evidence.

Ludlow, Serjt.—The defence founded on the barrenness of the land is open to the defendant on the plea of nil debet (e), without any special plea; and the plea of nil debet gives the plaintiff no sort of notice as to what line of defence is intended to be taken (f).

(d) R. & M. N. P. C. 254.

(e) In the case of *Lord Selsea v. Powell*, 6 Taunt. 297, it was held that, in an action of this kind, the onus of proving that the land is barren lies on the defendant.

(f) In the principal case the plea of nil debet did not inform the plaintiff what defence the defendant insisted on. One test, whether plaintiff is entitled to call witnesses in reply to the defendant's proofs, seems to be whether the intended defence was disclosed by the plea. For without such plea, or (as it seems in some cases without notice

to the plaintiff) dehors the plea, he cannot be reasonably called on to give contradictory evidence by anticipation of proof which the defendant might never give, or which, if given, the plaintiff could not foresee. In *Rees v. Smith*, 2 Stark. N. P. C. 31, the defendant, having pleaded two justifications in trespass, gave evidence in support of them, and Lord *Ellenborough* would not permit plaintiff to give general evidence in contradiction, saying, "As a general rule, a case is not to be cut into parts but *where it is known* what the question in issue

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ERSKINE, J. (stopping the plaintiff's counsel).—I think that the plaintiff is entitled to go into evidence in reply.

Ludlow, Serjt., declined to call his witnesses.

Verdict for the plaintiff.

Ludlow, Serjt., *Tyrwhitt*, and *Selfe*, for the plaintiff.

R. V. Richards, and *Whateley*, for the defendant.

[Attornies—*Chattock*, and *Lee*.]

In the ensuing term, *R. V. Richards* applied to the Court of Exchequer for a new trial, but the Court refused a rule.

is, it must be met at once." Since which, where several issues are joined, and the affirmative of some of them is on the defendant, the practice seems to have been to suffer the plaintiff to controvert the defendant's proofs of them, particularly if they are of any distinct matter collateral to the cause of action, and if the negative of them required no proof from the plaintiff in the first instance. But in the case of *Knapp v. Haskell*, 4 C. &

P. 590. Where, in an action for work and labour for a builder's bill, surveyors had been called for the defendant, to prove that in the year 1831 they surveyed the work, and that, in their judgment, the charges were £100 too much, it was held that a letter from the defendant's attorney, stating that the work had been surveyed in 1829, and that the charges were considered to be £60 too much, was not admissible as evidence in reply.

1842.

(Civil Side.)

BEFORE LORD CHIEF JUSTICE TINDAL.

REGINA v. PARKER, Esq.

PERJURY.—The first count of the indictment stated that, on the 14th of September, 1809, a commission of bankruptcy was issued against the defendant, and that, on the 11th of November, 1841, in a newspaper called the *Staffordshire Gazette* was published a letter, which was set out. [This letter was signed Wm. Stonier, which stated inter alia that a person had been put into the commission of the peace, and had accumulated great wealth, but whose debts the writer was informed were not yet paid, and reflected on the person so appointed.] And that the defendant intending to injure one William Stonier, and to cause the Court of Queen's Bench to grant a rule, calling on the said William Stonier, John Vickers, and Joseph Stringer [the proprietors of the *Staffordshire Gazette*] to shew cause why a criminal information should not be exhibited against them for publishing certain libels, and to put the said William Stonier to costs and charges in shewing cause against the said rule, came before William Dutton, a commissioner &c., having competent authority to administer the oath, and falsely &c. did depose, swear, and

A., in an affidavit, stated that he had paid all the debts proved under his bankruptcy except two, as to which he explained. On an indictment for perjury on this affidavit, one of the assignments of perjury was, that A. had not paid all the debts proved under his bankruptcy except two; and another that certain creditors [naming them] besides the excepted two, were not paid in full.

Held, that if the first assignment of perjury were too general, the defendant should have

demurred to it, and that although, by the generality of its form, the prosecutor was not precluded from proving the nonpayment of other creditors besides those named, yet, as names were stated in the other assignment of perjury, it was reasonable to presume that the defendant would suppose that they were the persons, the nonpayment of whose debts was to be relied on, and that in fairness the prosecutor ought not to go into evidence of the nonpayment of any other creditors than those named.

In support of this indictment several creditors were called, who each proved the nonpayment of his own debt:—*Held*, that this was not sufficient to warrant a conviction, and that as to the non-payment of each debt, it was necessary to have the evidence of two witnesses, or of one witness, and such corroborative testimony as is equal to the testimony of a second witness.

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make affidavit in writing, amongst other things, in substance as follows. The affidavit of the defendant was set out in this count of the indictment with innuendoes. It set forth the before-mentioned letter of Mr. Stonier, and stated that, in the year 1809, the defendant became bankrupt and passed all his examinations, and obtained his certificate, which was allowed by the Lord Chancellor, in 1810: and that the debts proved against the estate of the defendant "amounted, to the best of his the said William Parker's recollection, to about the sum of £1000;" that the assets, after paying all expenses, realized only sufficient to pay his creditors 1s. 8d. in the pound; that, in May, 1828, having by his industry and success in trade acquired the means of paying all his creditors, he caused to be inserted for three successive weeks, in three newspapers, a notice requesting all persons, who had proved debts against his estate, to transmit the particulars of those debts to him; "and that, in consequence of such notice, the creditors of the said William Parker, including not only those who had proved, but others who had not proved under the said commission, sent in the particulars of their claims, which were all, with the two exceptions thereafter next mentioned, paid by the said William Parker in full." The exceptions being, the one a claim of £15 or £20, for which the claimant said he had a draft which he refused to produce, and which claim the defendant believed to be fictitious; and the other a claim of £3 and £4, which the defendant believed was not owing; and, in support of which the claimant had no proof: and that the defendant believed that he was the person referred to in the letter of Mr. Stonier. "Whereas in truth and in fact the debts proved against the said W. P.'s estate amounted to the sum of £2500 and more, as he the said W. P., at the time of his taking the said oath and making the said affidavit, then and there well recollected and knew." "And whereas in truth and in fact, the creditors of the said W. P. who,

in consequence of the said notice, sent in their claims, were not all, with two exceptions only, paid by the said W. P. in full. And whereas, in truth and in fact, divers creditors of the said W. P., exceeding the number of two, that is to say, Richard Hicks, certain persons carrying on business under the name and firm of William Barker & Co., Simeon Phillips, William Hancock, and John Hancock, George Woolliscroft, Emmanuel Forrester, Moses Bates, Elijah Mayer, and John Howe, in consequence of the said notice, sent in the particulars of their respective claims to the said William Parker, which were not paid by the said William Parker in full." There were also assignments of perjury that the creditors, who *had proved* and had sent in their claims, were not all, with two exceptions, paid by the defendant in full. That R. Hicks, E. Mayer, and W. Bancks, *whose debts had been proved*, sent in their claims, and were not, nor was either of them, paid by the defendant in full. That the creditors who *had not proved*, but who had sent in their claims, were not all, with two exceptions, paid in full. That S. Phillips, W. and J. Hancock, G. Woolliscroft, E. Forrester, M. Bates, and John Howe, being creditors who had *not proved*, sent in their claims and were not paid in full. This count of the indictment then went on to state that the Court of Queen's Bench, on the 24th of November, 1841, on the motion of T. N. Talfourd, Esq., Serjeant at Law, and upon reading the said affidavit of the said W. P., and a printed paper thereunto annexed, and the several affidavits [describing other affidavits], did order that the first day of the then next term should be given to the said William Stonier, J. V., and J. S., to shew cause why one or more information or informations should not be exhibited against them the said William Stonier, J. S., and J. V., for certain misdemeanors in composing, writing, printing, and publishing certain scandalous libels; and then went on to aver, that "it became and was material, and the following questions became and were material questions, and each of them became and was a material

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question upon the said motion and upon the granting of the said rule:" that is to say, whether the debts proved under the commission of bankrupt which had issued against the defendant amounted to about £1000, or whether the defendant recollected and knew that they amounted to a much larger sum, that is to say, a sum exceeding the sum of £2500; and whether the creditors of the said W. P., including not only those who had proved their debts under the said commission of bankrupt, but other creditors of the said W. P. who had not proved their debts under the said commission, who sent in their claims to the said W. P. in consequence of the said notice, had been paid by him, the said W. P., in full; and whether the debts of all such of the said creditors who had not proved their debts as aforesaid, but had sent in their claims as aforesaid, had, with two exceptions only, been paid in full by the said W. P. And so the jurors &c. do say &c. [concluding in the usual form]. The second count of the indictment was in a similar form, but was founded on that part of the defendant's affidavit which stated that the amount of debts proved was, to the best of his recollection, about £1000. The third count was founded on that part of the affidavit which stated that all the creditors had, with two exceptions, been paid in full. The fourth count was similar to the third, except that it contained a separate assignment of perjury as to the nonpayment of each of the nine debts which it was charged in the first count that the defendant had not paid.

On the part of the prosecution, the original affidavit on which the perjury was assigned was put in, and also the commission of bankrupt (duly enrolled) which had issued against the defendant, dated September the 14th, 1809, and also the proceedings under it; from which it appeared that the debts proved amounted to about £2540. A printed copy of a letter of the defendant to Earl Talbot, the Lord Lieutenant of the county of Stafford, dated March the 1st, 1842, addressed in the defendant's handwriting, was also

put in. In this letter it was stated, inter alia, that the two claims mentioned as exceptions in the defendant's affidavit were those of Simeon Phillips and George Woolliscroft; and that with respect to the claim of Mr. Bancks, "he and his co-partners in trade had themselves either become bankrupts or made an assignment for the benefit of their creditors previously to the year 1828, and were not entitled to receive any money on account of their former trading transactions."

It was proved by Mr. Bancks, that, in consequence of the notice which appeared in the newspapers, he applied to the defendant for payment of a debt of about £54, which was due from the defendant to the firm of which he had been a partner, but that the defendant declined paying him, because he (the witness) had been a bankrupt.

Ludlow, Serjt., for the prosecution, proposed to go into evidence as to the non-payment of a debt due to Mr. Joseph Woolliscroft.

Talfourd, Serjt., for the defendant.—The nonpayment of that debt is not mentioned in the indictment.

Ludlow, Serjt.—Some of the assignments of perjury do not contain any names, and are that the defendant did not pay all his creditors who sent in their claims in full, with the exception of two.

Talfourd, Serjt.—Those assignments of perjury are bad, as being too general; it has been held (a), that, in an indictment against an insolvent for swearing that his schedule contained a statement of all his debts, an assignment of perjury stating that the schedule did not contain a statement of all the debts, without specifying what debts were omitted, is bad as being too general.

(a) In the case of *Rez v. Hepper*, 1 C. & P. 408.

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TINDAL, C. J.—If it be too general, you might have demurred.

Talfourd, Serjt.—There are other assignments of perjury in the indictment which do state the debts alleged to be unpaid, and which are good.

TINDAL, C. J.—You might have demurred to this assignment of perjury only, and, as you have not done so, I do not see how I can exclude the evidence.

Talfourd, Serjt.—This comes by surprise on the defendant.

TINDAL, C. J.—I think that omitting the names in one assignment of perjury and inserting them in the next is likely to mislead the defendant, as he would be very likely to suppose that the debts mentioned in general terms in one assignment of perjury were the same as those particularized in the other.

Ludlow, Serjt.—If your Lordship thinks that I ought not to press it, whatever may be the strict rule, I will withdraw the evidence.

The evidence was not given.

With respect to the debts alleged to be due respectively to Mr. Hicks, Mr. Forrester, Messrs. Hancock, Mr. Bates, and Mr. Howe, there was only one witness as to each debt who contradicted the affidavit of the defendant.

Talfourd, Serjt., for the defendant.—The affidavit of the defendant must be disproved by the oaths of two witnesses, or by one witness and some document which is equal to the testimony of another witness. Here all these cases are proved at the most by one witness only. And whether the total amount of debts proved under the commission was £1000, or £2500, was wholly immaterial.

TINDAL, C. J.—The allegations against the defendant as to each case are, that there was an existing debt, a particular of the claim sent in, and a refusal. Where is that proved as to any case by two witnesses?

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Ludlow, Serjt.—In the case of Mr. Bancks's debt, in addition to Mr. Bancks's evidence, the defendant in his letter to Earl Talbot does not deny the refusal, but attempts to account for it on other grounds.

TINDAL, C. J. (in summing up).—The charges against the defendant are of two kinds—the one relating to the amount of debts proved, and the other to various transactions with particular individuals. It is in evidence, that the defendant became bankrupt in the year 1809, and obtained his certificate in 1810; and that, in 1828, he published a notice that he would pay those who had proved debts under his commission; however, he seems afterwards to have changed his intention, and to have paid some of those who had not proved. In his affidavit, he says, that, to the best of his recollection, the debts proved amounted to about £1000. The first charge is, that the debts proved amounted, not to about the sum of £1000, but to £2500, and that the defendant knew that. The first observation on this part of the case is, that the defendant swears to the best of his recollection, and it requires very strong proof, in such a case, to shew that the party is wilfully perjured; I do not mean to say that there may not be cases in which a party may not be proved to be guilty of perjury, although he only swears to the best of his recollection, but I should say that it was not enough to shew merely that the statement so made was untrue. There is, in the present case, no motive to induce the defendant to state the amount for which he failed as being less than it was. It would have been much more favourable to him if he had sworn to £2500 than to £1000, as the larger the amount for which he failed, the more creditable in him to pay it up

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afterwards. I must leave it to you to say, whether there is enough to satisfy you that the defendant, in this instance, swore wilfully that which was not true; and in coming to a conclusion on that point, it is important for your determination that you should see whether the defendant had any motive for what he did. The second charge, or rather class of charges, is founded on another part of the defendant's affidavit, which states, that his creditors, including, not only those who had proved but others who had not proved their debts under his commission, who sent in the particulars of their claims, were all, with two exceptions, paid in full. In fair construction, I think that this must be taken only to include such demands as the defendant honestly thought were due. He has excepted two persons, who appear to be George Woollicroft and Simeon Phillips, and, therefore, as to them no perjury can be assigned. With respect to each of the other persons who are named as creditors of the defendant in this indictment, it is charged,—first, that there was a debt due to him—secondly, that particulars of it were sent to the defendant—and thirdly, that it was not paid: and with regard to the crime of perjury, the law says, that where a person is charged with that offence, it is not enough to disprove what he has sworn, by the oath of one other witness, and unless there are two oaths, or there be some documentary evidence, or some admission, or some circumstances to supply the place of a second witness, it is not enough; and I am unable in this case to say that there are two witnesses, whose evidence comes up to the triple proposition that I have stated as to any of the debts mentioned in the indictment. With respect to Mr. Bancks's debt, he states that he claimed £54, and that the defendant declined paying him because he (Mr. Bancks) had been a bankrupt, and I do not see that the case as to this debt is carried further by the letter to Earl Talbot. There is no evidence that the assignees of Mr. Bancks ever applied for the money, and no evidence that they have not

been paid. With respect to the debt due to Mr. Emmanuel Forrester, you have the evidence of only one witness, and that is the only direct evidence on that subject. Against that you have the oath of Mr. Parker on the other side, and as it rests there that is not enough. [His Lordship observed on the evidence as to the other parts of the case.] You will say whether any of the assignments of perjury are proved, and, if any, you will specify which.

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Verdict—Not guilty.

Ludlow, Serjt., *R. V. Richards*, and *Carrington*, for the prosecution.

Talfourd, Serjt., *W. J. Alexander*, and *Meteyard*, for the defendant.

[Attornies—*Bennet & Bowen*, and *Tomlinson & Keary*.]

STAFFORD ASSIZES.

(*Crown Side*.)

BEFORE MR. JUSTICE ERSKINE.

REGINA v. LEWIS WARDLE.

ROBBERY.—The prisoner was indicted for having assaulted and robbed Richard Myatt of thirty-eight sovereigns and two £5 notes, on the 20th day of May, 1842, at High Offley.

The prisoner had been arraigned and the jury sworn without any challenge or objection of any kind, and *Corbett*, for the prosecution, had opened the case and examined one witness, when the foreman of the jury stated that the prisoner had a relation on the jury.

July 23rd.
If during the trial of a case of felony, it be discovered that the prisoner has a relation on the jury, this is no ground for discharging the jury, and the case must proceed.

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Corbett, for the prosecution.—I submit that this jury may be discharged without giving any verdict, and a new jury be called and sworn.

ERSKINE, J. (having conferred with *Tindal*, C. J.)—I have conferred with the Lord Chief Justice, and we are of opinion that I have no power to discharge the jury, and that the case must proceed.

The case proceeded.

Verdict—Guilty.

Corbett and *Allen*, for the prosecution.

W. Johnstone Neale, for the prisoner.

[Attornies—*Butterton*, and *Brown*.]

HEREFORD ASSIZES.

(*Civil Side*.)

BEFORE LORD CHIEF JUSTICE TINDAL.

DOE on the Demise of MEYRICK, Knt., v. HOWELLS.

If in a conveyance, A., the conveying party, has covenanted that for and notwithstanding any act, matter, or thing done or committed by him, he has a good title, this does not render him an incompetent witness in an ejectment brought for the premises by his grantee, unless it be shewn that the defendant's title arose from some act of A.

EJECTMENT to recover a piece of land situate at Goodrich.

On the part of the plaintiff, a conveyance by Catherine Hill, Mary Hill, and the Rev. Walter Hill, to the plaintiff, was put in. And in this conveyance the Rev. Walter Hill covenanted for himself, his heirs, executors, and administrators, that “for and notwithstanding any act, matter, or thing whatsoever by Kedgwin Hoskins, the said Catherine

in an ejectment brought for the premises by his grantee, unless it be shewn that the defendant's title arose from some act of A.

Hill, Mary Hill, Walter Hill, or Guy Hill, deceased, done or committed," the said Catherine Hill, &c., had a perfect estate of inheritance. It was proposed on the part of the plaintiff to examine the Rev. Walter Hill as a witness.

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Ludlow, Serjt.—I submit that the Rev. Walter Hill is not in this case a competent witness for the plaintiff, as he has covenanted for title.

TINDAL, C. J.—He is a perfectly competent witness, unless the defendant's title arises from some act of himself, or of some other of the persons named in the covenant. I shall therefore receive his evidence, unless you shew that the defendant's title arose from some act of the Rev. Walter Hill, or of some one or more of those persons who are named in the covenant. You are the party making the objection, and it lies on you to shew that it arises.

The Rev. Walter Hill was examined.

Verdict for the plaintiff.

Talfourd, Serjt., and *John Gray*, for the plaintiff.

Ludlow, Serjt., and *F. V. Lee*, for the defendant.

[Attornies—*Hooper & Son*, and *Jackson*.]

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(Crown Side.)

BEFORE MR. JUSTICE ERSKINE.

REGINA v. MILBOROUGH TRILLOE.

If a child has been wholly produced from the body of its mother, and she wilfully, and of malice aforethought, strangle it while it is alive, and has an independent circulation, this is murder, although the child be still attached to its mother by the umbilical cord.

MURDER.—The indictment consisted of four counts, the second of which charged that the prisoner, being big with a female child, "*did bring forth the same alive;*" and then proceeded to allege, in the usual form, the murder of the child by the prisoner, by fastening a handkerchief about its neck and throat, and thereby choking and strangling it. The third count described the child as a certain illegitimate child "*then lately* before born of the body of the said Milborough Trilloe," and charged the murder as in the second count.

On the part of the prosecution there was strong evidence to prove that the child had been wholly produced alive from the prisoner's body, and that she had strangled it by fastening a handkerchief or some such thing round its throat; but it was also clearly proved by Mr. Wood, the surgeon who examined the body of the child, that it must have been strangled before it had been separated from the mother by the severance of the umbilical cord: and it was further stated by Mr. Wood that a child has, after breathing fully, an independent circulation of its own, even while still attached to the mother by the umbilical cord, and that in his judgment the child in question had breathed fully after it had been wholly produced, and had therefore an independent circulation of its own before and at the time it was strangled, and was then in a state to carry on a separate existence.

W. H. Cooke, for the prisoner, referred to the cases of *Rex v. Enoch (a)*, and *Rex v. Crutchley (b)*.

(a) 5 C. & P. 539.

(b) 7 C. & P. 814.

ERSKINE, J.—I agree in the view of the law taken by my Brother *Parke* in the case of *Rex v. Crutchley* ; and if it should become necessary I shall adopt the course he suggests in that case, and reserve the question for the opinion of the Judges.

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W. H. Cooke addressed the jury for the prisoner.

ERSKINE, J. (in summing up).—If you are satisfied that this child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully and of her malice aforethought strangled the child after it had been so produced and while it was alive, and while it had, according to the evidence of the surgeon, an independent circulation of its own, I am of opinion that the charge in the second and third counts of this indictment is made out against the prisoner, although the child, at the time it was so strangled, still remained attached to the mother by the navel-string.

Verdict—Guilty.

Greaves, for the prosecution.

W. H. Cooke, for the prisoner.

[Attornies—*Macefield*, and *Symonds*.]

The case was reserved by the learned Judge for the opinion of the fifteen Judges, who held the conviction right.

1842.

MONMOUTH ASSIZES.

(Crown Side.)

BEFORE LORD CHIEF JUSTICE TINDAL.

REGINA v. ROBERTS.

D. was in the habit of buying bones for F., and of drawing on F. for the price before he delivered the bones. The prisoner forged D.'s name to a letter to F. asking for 3*l.*, and stating that he had bought a large quantity of bones. F. did not at this time owe any money to D.:—*Held*, that this was not an order for the payment of money within the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 3.

FORGERY.—The prisoner was indicted for forging and uttering a forged order for the payment of money (which was set out in some of the counts in the indictment) with intent to defraud John Edward Fisher. The forged instrument was in the following form:—

“ Monmouth, June 9th, 1842.

“ Mr. Fisher,—I should feel greatly obliged if you will please to send me by the bearer the sum of £3, as I have a large quantity of bones this week, and the man from Coleford is coming in to-morrow with ten cwt. I have about one ton now.

“ Yours,

“ Mr. P. Fisher,

“ THOMAS DAVIS.”

“ Lanwarne.

It appeared that the prisoner had written this letter and forged the signature of Davis thereto; and that Mr. John Edward Fisher had, on the faith of its being genuine, paid the £3 to the person who brought it to him. It further appeared that Davis was a waterman, who resided at Monmouth, and that he was in the habit of collecting bones throughout the neighbouring country, and sending them to Fisher as he collected them, generally by a waggon-load or three tons at a time; and that he did not wait till he had delivered the bones before he got paid, but drew on Fisher as he was collecting the bones; but that, at the time this letter was written, Davis had overdrawn and had no money due to him from Fisher.

TINDAL, C. J.—I doubt whether this is an order for the payment of money within the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 3, and I will reserve this point for the consideration of the Judges.

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Verdict—Guilty.

Huddleston, for the prosecution.

[Attorney—Owen.]

In the ensuing term the case was considered by the fifteen Judges, who held the conviction wrong.

GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE LORD CHIEF JUSTICE TINDAL.

AUSTIN v. CROOME and Another.

August 8th.

ASSUMPSIT for money had and received, with a count upon an account stated. Plea,—except as to the £5, non assumpserunt, and as to that sum payment of it into Court.

The person who is entitled to the inheritance has a right to the possession of the title-deeds; and it is no answer to an action founded on his right to the possession of the deeds to shew that another person has a term of 1000 years vested in him to attend the inheritance.

It was opened by *R. V. Richards*, for the plaintiff, that, in the year 1828, Mr. James Croome, who was not one of the defendants, had agreed to purchase a farm called the Saddlebags; but before his purchase was completed it was arranged that Mr. Edward Austin should buy it, giving Mr. James Croome £50 for his purchase, which he did, and by a subsequent arrangement the property was conveyed by Mr. Edward Austin and Mr. James Croome to the plaintiff, Mr. William Austin, in fee. The defendants, Messrs. Croome, who were solicitors, had had the deeds of this property in their hands, and would not give them up unless a sum of 42*l.* 0*s.* 9*d.* was paid to them

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—they claiming a lien on the deeds to that amount. This sum was paid by the plaintiff, and the deeds were given up to him; and the present action was brought for 37*l.* 0*s.* 9*d.* (the balance beyond the £5 paid into Court), on the ground that whatever claims the defendants had on other persons, they had no lien on these deeds as against the plaintiff.

On the part of the plaintiff, an indenture of release, dated the 17th of May, 1842, was put in. It was between Edward Austin of the first part, James Croome of the second part, William Austin (the plaintiff) of the third part, and Anthony Austin of the fourth part. By this release the Saddlebags farm was conveyed to the plaintiff in fee; but the residue of an outstanding term of 1000 years was assigned to Anthony Austin to attend and protect the inheritance.

Talfourd, Serjt.—I submit that the present plaintiff cannot maintain this action, as he has not the legal estate. For the remainder of this term of 1000 years, the legal estate is in Mr. Anthony Austin and his representatives.

TINDAL, C. J.—The charters and muniments of the estate go with the person who has the inheritance; and I cannot put a person who has a term of 1000 years in a different situation from one who has a seven years' lease, or is a tenant from year to year.

Verdict for the plaintiff.

R. V. Richards and *F. V. Lee*, for the plaintiff.

Talfourd, Serjt., *Greaves*, and *G. Jones*, for the defendants.

[Attornies—*Van Sandau*, and *Croome & Son*.]

In the ensuing term, *Greaves* applied to the Court of Exchequer for a new trial, on the point above reported,

when the Court refused a rule; but, upon other grounds the Court granted a rule, which was, after argument, discharged.

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 }
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MIDLAND SUMMER CIRCUIT, 1842.

BEFORE BARON PARKE AND MR. JUSTICE PATTESON.

WARWICK ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE PATTESON.

REGINA v. OVERTON.

PERJURY.—The indictment charged, that before and at the time of the taking of the false oath by the defendant, R. L., clerk, F. D. P., clerk, and H. S. G., Esq., “were commissioners acting in the execution of certain acts of Parliament relating to the duties of assessed taxes in and for the district of the hundred of Knighton, in the county of Warwick, and thereupon, heretofore, to wit, on” &c., at &c., “at a meeting then and there held by the commissioners aforesaid, for the purpose of hearing and determining appeals against the certificates of supplementary charges made by one John Lee, crown surveyor, in pursuance of the said acts, *a certain appeal of one William Hewatt, of Combfields, in the district and county aforesaid,*

In an indictment for perjury, before commissioners of taxes, on an appeal of H. against a surcharge for a greyhound used by H. on the 24th of November, it was averred to be a material question whether a receipt for the price of the greyhound was given to the defendant before the 12th of September.

When before

the commissioners, the defendant swore that he bought the greyhound of H. on the 6th of September, and had a receipt for the price before the 12th of that month. It was objected that the sale of the greyhound was the only material fact, that the receipt was immaterial, and that the 12th of September was an immaterial day:—*Held*, that the receipt was material, and that it was properly laid that it was a material question whether the receipt was given on the 12th of September.

Every question on cross-examination of a witness, which goes to his credit, is material.

On a crown case reserved, the Judges will not allow the prisoner's counsel to argue objections that are apparent on the face of the indictment, but will leave the prisoner to his writ of error.

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in due form of law came on to be heard," and that the defendant appeared before the commissioners "as a witness for and on behalf of the said William Hewatt, upon the hearing of the appeal aforesaid," and was sworn, and "that upon the hearing of the said appeal, it then and there became and was a material question whether a certain receipt then and there produced by the said J. O. was given to him before the 12th day of September then last past;" that the defendant "falsely, corruptly, knowingly, and wilfully" swore "that the receipt aforesaid was given to him the said J. O. before the 12th day of September aforesaid," whereas in truth it was not, as the defendant well knew; and so the defendant, on &c., at &c., "in manner and form aforesaid, *falsely and wickedly* did commit wilful and corrupt perjury."

It was proved, that at the commissioners' meeting evidence was given that William Hewatt and the defendant were coursing with two greyhounds on the 24th of November, 1841, and that one of the dogs had been Hewatt's, who had no game certificate; that on the 28th of November he was surcharged for a greyhound, and that on his appealing to the commissioners against this surcharge, he stated that the dog had been sold to the defendant long before, and he called the defendant as a witness before the commissioners to prove it. It further appeared, that the defendant swore before the commissioners that he bought the dog of Hewatt on the 6th of September, 1841, and he produced a receipt for the purchase-money, 5*l.* 5*s.*, bearing that date; and that he was asked by Mr. Lee, the surveyor, whether the receipt was given at the time of the sale, and he said it was not, but a few days after; and on his being pressed, he said that it was given to him before the 12th of September; and on Mr. Lee pointing out that the stamp on the receipt bore date the 18th of November, 1841, and saying that the defendant must be mistaken, the defendant still persisted in his statement, and swore positively that the receipt was given to him before the 12th of September.

Evidence was given by officers from the Stamp-office, that the paper on which the receipt was written was stamped on the 18th of November, 1841, and could not have been issued from the Stamp-office before that day.

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W. T. S. Daniel, for the defendant.—I submit that the materiality of the question as stated in the indictment has not been shewn. The indictment states that it was a material question whether the receipt had been given before the 12th of September; now the material question was, whether the dog was Hewatt's or the defendant's on the 24th of September, the day of the coursing. It has not been disproved that there was a sale of the dog on the 6th of September, as sworn by the defendant; and if there was, the time of the giving of the receipt, or even the fact of any receipt having been given at all, was immaterial. It ought to have been alleged in the indictment that there was no such sale, or at all events it should have been so proved in order to make the question as to the time of giving the receipt material.

PATTERSON, J. (after having conferred with *Parke*, B.)—My Brother *Parke* and myself both think that the materiality of the question as laid in the indictment has been sufficiently shewn.

Verdict—Guilty.

W. T. S. Daniel moved an arrest of judgment on three grounds; first, that there was no allegation in the indictment negating the sale of the dog; second, that in the concluding part of the indictment it was not alleged that the defendant did thereby "wilfully and corruptly" commit wilful and corrupt perjury, but only that he "falsely and wickedly" committed wilful and corrupt perjury; third, that the perjury consists in the intention, which is expressed by the adverb in the last sentence, and not by the adjectives, and that the adverbs used in the body of the indictment would not help the defect.

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PATTESON, J.—I shall overrule these objections, and I will reserve the point as to the materiality for the consideration of the fifteen Judges, and (though properly matter for a writ of error) I will mention the other points, that the Judges may, if they think proper, give their opinions upon them.

Sentence—Seven years' transportation.

Adams, Serjt., and *J. Hillyard*, for the prosecution.

W. T. S. Daniel and *A. Adams*, for the defendant.

[Attornies—*Poole & Haymes*, and *Wilmot*.]

BEFORE LORD DENMAN, C. J., TINDAL, C. J., LORD ABINGER, C. B., PATTESON, J., GURNEY, B., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., ERSKINE, J., MAULE, J., AND ROLFE, B.

W. T. S. Daniel, for the defendant.—I propose, first, to advert to the objections which appear on the face of the indictment. It is stated in the indictment that there was an appeal of William Hewatt before the commissioners, but not what the subject of that appeal was.

PATTESON, J.—This point occurred to me at the Assizes.

TINDAL, C. J.—This is properly a ground for a writ of error; and if we were to decide against you here, you would bring a writ of error.

W. T. S. Daniel.—The prisoner would undertake to bring no writ of error (a).

TINDAL, C. J.—We cannot take the undertaking of a prisoner.

(a) See the case of *R. v. Purchase*, ante, p. 617.

W. T. S. Daniel.—The objection, that the averment of materiality was not sufficiently proved, is not upon the record; and with respect to that, the allegation is, that it was a material question, whether a certain receipt was given before the 12th of September. Now, on the assumption that the dog was sold on the 6th, which was not disproved, it is wholly immaterial whether the receipt was given before or after the 12th.

Lord ABINGER, C. B.—The whole matter turned on the credit of the witness, and he tries to support his credit by false evidence. The receipt is to confirm his evidence, and he swears it was given before the 12th. If that were true, the proof would be decisive. I think you cannot make anything of this point.

WILLIAMS, J.—The time when this receipt is given is a step in the proof.

Lord DENMAN, C. J.—You cannot dispute that every thing that comes out at a trial is material, if it goes to the credit of the witness.

Lord ABINGER, C. B.—Every question of cross-examination, which goes to the credit of the witness, is material. If a witness were asked, in cross-examination, whether he was in such a place at such a time, and he denies it, that would be material if it went to his credit (*b*). In the

(*b*) In the case of *Rex v. Greepe*, 2 Salk. 513, Lord Holt held, "that if a man gives evidence to the credit of a witness, though this be not the issue, yet 'tis perjury;" and from the report of the same case, 1 Ld. Raym. 256, (nom. *Rex v. Griepe*), it appears that his Lordship "was of opinion that it is not necessary to appear in an information for perjury to what degree the point in which the man is perjured

was material to the issue, for if it is but circumstantially material, it will be perjury. For if A. swears that B. delivered a deed in a blue coat, when in truth he was in a red, this will be perjury, for a witness swears to the circumstances; so, if a witness swears to the credit of another witness, if it be false, it will be perjury, if it conduces to the proof of the point in issue."

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present case, if they could not have contradicted the witness by the date on the stamp, the receipt, confirming his evidence, would have made out the case before the commissioners.

W. T. S. Daniel.—Your Lordships being against me on this point, my client must upon the other points apply for a writ of error, as your Lordships have suggested.

PATTESON, J.—The writ of error should be sued out promptly; and if it be so, I will take care that the prisoner is not removed from his present custody till it is decided (*c*).

(*c*) A writ of error was sued out, and after argument in Hilary Term, 1843, the Court of Queen's Bench gave judgment for the defendant, on the ground that it did not sufficiently appear upon the face of the indictment that the false swearing took place in a judicial proceeding before a competent tribunal.

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STAFFORD SPECIAL COMMISSION, 1842 (a).

BEFORE LORD CHIEF JUSTICE TINDAL, BARON PARKE, AND
BARON ROLFE.

REGINA v. HARRIS, and Twenty-eight Others.

Oct. 3.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for feloniously demolishing a house. The first count of the indictment

If rioters destroy a house by fire, this is a felonious demolition of it

within the stat. 7 & 8 Geo. 4, c. 30, s. 8, and the persons guilty of such an offence may be convicted on an indictment founded on that enactment, and need not be indicted for arson under sect. 2 of that statute.

If in a case of feloniously demolishing a house by rioters, it appears that some of the prisoners set fire to the house itself, and that others carried furniture out of the house and burnt it in a fire made on a gravel walk on the outside of the house, it will be for the jury to say whether the latter were not encouraging and taking part in a general design of destroying the house and furniture, and if so the jury ought to convict them.

(a) The following is an extract of the charge of the Lord Chief Justice to the grand jury on this special commission:—

“Gentlemen, it is not our design, nor indeed have we sufficient information on the subject, if we proposed to do so, to trace, with any particularity, the origin or exact progress of those violations of the law which have taken place within this county, and which will shortly be brought under your consideration. It is fully sufficient for our present purpose to give a general outline of those transactions, drawn from the depositions taken before the magistrates, the only legitimate source of information to

which we have had access. It appears that about the middle of the month of August last the workmen employed in many of the collieries, and also in many of the various manufactories established in this county, had become dissatisfied as well with the amount of wages allowed by their employers as in some instances with certain regulations under which they were placed in the course of their employment; and that for the purpose of compelling their masters to allow them greater wages, and to alter the regulations by which they thought themselves aggrieved, they refused to continue to work at the various employments in which they had been engaged; that in a short

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ment charged the prisoners with having, on the 15th of August, 1842, feloniously demolished and destroyed the

time, not contented with simply refusing to work, they proceeded, by threats, intimidation, and violence, to compel other workmen, who were willing to continue to work, to join the number of those who were discontented. It appears further, that whilst large bodies of the workmen, perpetually increasing in number, were thus collected together, in a state of idleness, and, of consequence, destitution, certain strangers, persons altogether unconnected with them in interest, appeared amongst them, and by addresses made to them against the religion, the law, and the Government, excited them to a state of dissatisfaction with all the established institutions of the country, and laboured to persuade them to persist in their refusal to return to their employment, as the sure, and effectual, and only means of redressing the evils by which they were oppressed, and of obtaining their just rights, called by the speakers the 'People's Charter.' It appears that after such addresses had been made, in some places tumult and disorder forthwith ensued amongst the assembled multitudes, to the great terror and alarm of the quiet and peaceable part of the community. In other places large bodies of the workmen, so collected together, proceeded to acts of open violence and breaches of the law, in some instances against the persons of the subjects of the Queen, by beating some, cutting and maiming and robbing others, and sometimes against their property, by acts of theft and plunder, by forcibly break-

ing into the dwelling-houses of individuals by day and by night, by the destruction of dwelling-houses by actual demolition or by fire. It has already been intimated that we conceive it to be no part of our province on this occasion to discuss the justice of the complaints made by the workmen against their employers, or to decide upon the merits of the dispute between them. Our direct and more useful course will be to endeavour to expound the law as it applies itself to the several cases arising out of these unhappy transactions, upon which you will be required to exercise your judgments. And the first observation that arises is, that if the workmen of the several collieries and manufactories, who complained that the wages which they received were inadequate to the value of their services, had assembled themselves peaceably together for the purpose of consulting upon and determining the rate of wages or prices which the persons present at the meeting should require for their work, and had entered into an agreement amongst themselves for the purpose of fixing such rate, they would have done no more than the law allowed. A combination for that purpose, and to that extent (if indeed it is to be called by that name), is no more than is recognised as legal by the statute 6 Geo. 4; by which statute also exactly the same right of combination, to the same extent, and no further, is given to the masters when met together, if they are of opinion the rate of wages is too high. In the

dwelling-house of the Rev. Dr. Vale. The second count was for beginning to demolish and destroy the house.

case supposed—that is, a dispute between the masters and the workmen as to the proper amount of wages to be given—it was probably thought by the legislature, that if the workmen on the one part refused to work, or the masters on the other refused to employ, as such a state of things could not continue long, it might fairly be expected that the party must ultimately give way whose pretensions were not founded in reason and justice—the masters if they offered too little, the workmen if they demanded too much. But, unfortunately for themselves and others, those who were discontented did not rest here. Not satisfied with the exercise of their own right to withhold their own labour if they were discontented with the price they received for it, they assumed the power of interfering with the right which others possessed—of exercising their discretion upon the same point; and accordingly you will have numerous cases laid before you in which large bodies of dissatisfied workmen interfered by personal violence, and by threats and intimidation, to compel others, who were perfectly willing to continue to labour in their callings at the rate of wages then paid, to desist from their work, to leave the mine or manufactory, and against their own will to add themselves to the numbers of the discontented party, than which a more glaring act of tyranny and despotism by one set of men over their fellows cannot be conceived. If there is one right which, beyond all others, the labourer ought to be able to call

his own, it is the right of the exertion of his own personal strength and skill, in the full enjoyment of his own free will, altogether unshackled by the control or dictates of his fellow-workmen; yet, strange to say, this very right, which the discontented workman claims for himself to its fullest extent, he does, by a blind perversity and unaccountable selfishness, entirely refuse to his fellows who differ in opinion from himself. It is unnecessary to say, that a course of proceeding so utterly unreasonable in itself, so injurious to society, so detrimental to the interests of trade, and so oppressive against the rights of the poor man, must be a gross and flagrant violation of the law, and must be put down, when the guilt is established, by a proper measure of punishment. But, even without any evidence that combination is the object or purpose of the meeting, if a large body of the people assemble themselves together for the purpose of obtaining any particular end, and conduct themselves in a turbulent manner, either accompanied with acts of violence, or with threats and intimidation calculated to excite the terror and alarm of the Queen's subjects, this is in itself a riot, whether the end and object proposed be a just and legitimate one or not. If, therefore, bills should be brought before you charging individuals with riot, for the purpose of raising the rate of wages, and the evidence should shew the conduct of the parties to have been of the description just adverted to, the offence of riot is

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It appeared, that, on the 15th of August, 1842, there was a meeting at a place called Crown Bank, at which

complete in point of law. There is another description of offence which will probably be submitted to your consideration—namely, the exciting and encouraging large masses of the people by means of seditious and inflammatory speeches to commit acts of violence and to break the peace. If such charges are brought forward, it must be left to your own good sense to distinguish between an honest declaration of the speaker's opinion upon the political subjects on which he treats—a free discussion on matters that concern the public, as to which full allowance should be made for the zeal of the speaker, though he may somewhat exceed the just bounds of moderation; and, on the other hand, a wicked design, by inflammatory statement and crafty and subtle arguments, to poison the minds of the hearers and render them the instruments of mischief. He that addresses himself to a crowded auditory of the poorer class, without employment or occupation, and brooding at the time over their wrongs, whether real or imaginary, will not want hearers ready to believe and apt followers of mischievous advice. You will consider, therefore, the language that is employed on such an occasion; if it consists of broad and bold assertion, unfounded in fact; if, in discussing religious topics, you find the speaker endeavouring to be sprightly and facetious on those subjects which make wise and good men serious; if, instead of argument, he deals only in sneers and sarcasm, it will be for yourselves to

say whether, under such circumstances, the party charged with the offence is an honest but mistaken man, or whether he is wickedly intending to bring the religion, laws, and government of the country into contempt, and to teach the hearers to despise all those institutions which it is their duty to hold in respect and veneration. Gentlemen, it has been already stated, that, in the multiplicity of charges which spring out of the transactions above adverted to, some will appear for assaults; some for the felonious offence of cutting and maiming with intent to do grievous bodily harm; some for robbery by violence and force; some for theft; some for breaking into the dwelling-house by night or by day; some for a riotous assembling, and beginning to demolish, or actually demolishing, the dwelling-houses of magistrates and clergymen, the offices connected with the police establishments, and the private houses of individuals; some charges also for effecting similar works of destruction by means of fire. But it would be tedious, and, at the same time, altogether unnecessary, to enlarge upon the law by which those offences are regulated, more especially to gentlemen as well experienced as yourselves in the ordinary business of the assizes. One observation only shall be made which relates to every species of offence committed by several acting in concert and company together—namely, that if many are present at the time when the breach of the law takes place, having one common design in view, and acting

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seditions language was used; and that a mob proceeded from thence to the police office at Hanley, which they

with common consent, although they do not all take share in the performance of the very act which is the subject of the indictment, yet by affording countenance, encouragement, and protection to the persons who actually perpetrate the crime, they are all equally guilty in the eye of the law. But there is one case in the calendar to which, for the purpose of avoiding any interruption in the general view of the transactions which have taken place in this county, I have not yet adverted—I mean the case of one William Ellis, who has been committed by the magistrates on a charge of high treason; and as we are not aware whether bills of indictment may not possibly be presented against that person, and perhaps others also who appear upon the depositions to stand in the same predicament for the offence of high treason, it becomes necessary that the principles of the law, so far as it relates to the species of treason upon which the charge, if preferred, will probably be founded, should be laid before you with sufficient precision to enable you to determine whether the accusation is so far established that the parties accused ought to be put upon their trial for that offence. Gentlemen, the precise species of high treason upon which the charge, if made, must rest, is either that of levying war against Her Majesty in her realm, under the statute of Edw. III., or that for which Ellis was committed,—namely, “the compassing and intending to levy war against the Queen within her realm, in or-

der by force or constraint to compel her to change her measures or counsels;” which latter offence was first made substantive treason by the more recent statute 36th George III. c. 7, made perpetual by a subsequent act. You are well aware that, at least as early as the statute 25th Edward III., and thence down to the present time, the bare compassing or imagining the death of the Sovereign, when proved by any open or overt act, has amounted to high treason. For, where the life or personal safety of the Sovereign is concerned, so precious has it always been held in the eye of the law, that the bare intention or imagination of the heart, to put it in jeopardy, although no injurious consequences follow from such intention, when proved by an overt act, has, of itself, and alone, constituted the treason. By that statute also, the levying of war within the realm, when proved by an overt act, is made a distinct and substantive species of treason. But the mere “compassing” or “intending to levy war,” that is, the mere purpose or design of the mind or will to commit that crime, was never made a specific treason until the statute 36th George III. c. 7, and then only “where such compassing or intention is expressed, uttered, or declared, by publishing any printing or writing, or by any overt act or deed.” Now, the only or principal evidence of treason stated in the depositions is the uttering of violent and inflammatory speeches to the assembled multitude. But it is to be obser-

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broke open, and after arming themselves with the cutlasses and staves which they found there, proceeded to the house of the Rev. Dr. Vale, at Longton, near Stoke-upon-Trent, and after asking for a sovereign, which was not given them, they broke into the house through the study window, demolished all the windows, and set fire to the house. It was proved by the Rev. Dr. Vale, that the crowd were armed with staves, hatchets, bludgeons, and a sword, and were making

ved, that the mere speaking and uttering of words, considered by itself, and abstractedly, and without reference or connexion with any act or design, however wicked and atrocious those words may be, is not an act of treason. The judges, on a reference made to them in the 4th year of Charles I., upon the subject of words spoken by one Pyne, certified unanimously, 'that though the words were as wicked as might be, yet they were no treason, for unless it be by some particular statute no words will be treason.' On the other hand, however, where words are uttered and spoken with reference to any treasonable plan or design already laid, and in the contemplation of the speaker, if they are words of exhortation or encouragement to carry into effect such plan or design, such speaking and uttering of words is strictly and properly an overt act of treason, being the means made use of to effect the treasonable purpose; although, even in that case, the more precise and accurate mode of expression would seem to be, that the plan or design is the treason and the words of encouragement and incitement are evidence of the existence of it. It will be for you, therefore, to say, supposing no fur-

ther evidence is given than that of words uttered, supposing there is no proof laid before you of any existing plan to subvert the authority of the Queen, the established order of government, or the laws of the land,—whether, from the mere speaking and uttering of the words by the party charged with treason, you can feel yourselves authorized to infer that at the time the words were uttered there did exist a deliberate design in the mind of the speaker to effect any of those wicked purposes, and that the speech was made by him to induce the hearers to take up arms, or to use force and violence for the purpose of carrying such design into effect; you must determine for yourselves whether such is the safe conclusion at which you can arrive upon such evidence alone, or whether the words are not rather to be considered as the production of a heated and distempered mind, thrown out at the moment rashly and hastily—words, indeed, 'as wicked as might be,' as was said in Pyne's case, but words spoken without reference to any formed design or settled purpose in the heart of the speaker. In the latter mode of viewing them they would not constitute an act of treason, but be punishable as a high misdemeanor only.

a great noise; and that a fire was kindled on the gravel walk in the front of his house, and articles of furniture brought from the house and burnt in it, and also the house itself set on fire; and that, on his going to the house on the next day, he found that fires had been lighted on the floors of the study, school-room, dining and drawing rooms, kitchen, and two bed-rooms, and that the house was, in consequence, rendered totally uninhabitable. With respect to some of the prisoners, the evidence was, that they actually set fire to the house itself; but with respect to others, it was proved, that they were present and carried articles of furniture out of the house, and put them on the fire which was on the gravel walk.

TINDAL, C. J., (in summing up.)—The stat. 7 & 8 Geo. 4, c. 30, s. 8, in the first place enacts, that if persons riotously and tumultuously assembled together to the disturbance of the public peace, demolish or pull down a house, or begin to demolish or pull down a house, &c. they shall be guilty of felony, and those words would rather point to a demolition of the house by separating from each other, by pulling down, the materials of which the house is composed; but the statute has also words of much larger signification, which are, “destroy” or “begin to destroy.” Now, it is impossible to say that there can be any greater element of destruction than that of fire. There is no doubt, therefore, that, whether the intention of the parties was to demolish and destroy by pulling down the materials of the house, or by reducing the house to a useless state for habitation by the agency of fire, the offence is completely the same with respect to those parties who are implicated in the transaction. There are two classes of cases to which the evidence here applies, but both of them are proper for your consideration—the one, consisting of those, in which persons are proved to have been actually setting fire to the house itself, or feeding and supplying the fire with fresh materials from time to time; the other, consisting of those, where persons threw

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articles of furniture into the fire which was made on the outside of the house. With respect to the former there can be no doubt, and as to the latter, it will be for you to say how far those persons, although they were not actually employed in feeding the fire which was existing in the house, were there with a knowledge of what was going on, encouraging, taking part in, and endeavouring to complete that which may have been the general design of those who were assembled, namely, the destruction of the house and the furniture in it. And in order to make out the charge against the prisoners you must be satisfied either that they were the very parties who actually did destroy and demolish, or begin to destroy and demolish this house by the agency of fire, which was the intention of the mob, or that they being on the spot at the time, were taking such steps in the transaction that they may be said to have encouraged and assisted, and by their acts to have aided and abetted, in the object and design of destroying or beginning to destroy the house of Dr. Vale.

Verdict—Guilty, as to all the prisoners, except three.

Follett, S. G., Ludlow, Serjt., Talfourd, Serjt., Godson, Talbot, and Waddington, for the Crown.

G. Price, F. V. Lee, Meteyard, Allen, W. Johnstone Neale, and Huddleston, for the respective prisoners.

[Attornies—*Solicitors of the Treasury*, for the prosecution, and *Whalley, Williams, Roberts, and Brown*, for the respective prisoners.]

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REGINA v. SIMPSON, ELLIS, and Sixteen Others.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for feloniously demolishing a house.

The prisoners were charged in the first count of the indictment with having feloniously demolished and destroyed the house of the Rev. Robert Ellis Aitkins; second count, for having feloniously begun to demolish and destroy the house.

As soon as the prisoner Ellis had pleaded to the indictment, *Allen*, for the prisoner Ellis, applied that he should be tried separately and after the other prisoners who were included in the same indictment with him, on the ground that the prisoner Ellis had been originally charged with high treason, and not with the offence which was the subject of the present indictment, and also because only four witnesses had been examined before the magistrates of whose depositions the prisoner had been furnished with copies, and there were the names of thirty-two witnesses on the back of the indictment, of the nature of whose evidence the prisoner was unaware.

TINDAL, C. J.—I cannot take this prisoner out of a joint indictment to which he has pleaded not guilty. It is one mode, and a constitutional mode, of commencing a prosecution, that the witnesses should go at once before the grand jury, and that is what they have done on the present occasion, and whenever that is so, it is impossible to give copies of the depositions, because none are taken.

The case proceeded against all the prisoners, and it appeared that about midnight on the 15th August, 1842, a mob of persons, some being armed with cutlasses, staves, and bludgeons, came to the house of the Rev. R. E. Aitkins, and having burst open the front door and entered the house, they destroyed the furniture, and at about twenty

A prisoner had been omitted on a charge of high treason, and afterwards the grand jury returned a true bill against him with others, for feloniously demolishing a house, under the stat. 7 & 8 Geo. 4, c. 30, s. 8. He pleaded to that indictment, and wished to be tried after the other prisoners, who were indicted with him for feloniously demolishing the house; on the ground that he had had no copy of any depositions as to that charge. But this was not allowed, as the prosecution might have been commenced without going before any magistrate, and then there would have been no depositions at all.

If a house be demolished by rioters by means of fire, one of the rioters who is present while the fire is burning, may be convicted for the felonious demolition under the stat. 7 & 8 Geo. 4, c. 30, s. 8, although he is

not proved to have been present when the house was originally set on fire.

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minutes before one o'clock set the house on fire. It was proved by a witness named Goodwin, that between two and three o'clock on the morning of the 16th of August, he saw the prisoner Ellis standing within the railing in front of the house, which was then on fire; and to shew that the prisoner Ellis was not innocently present, evidence was given of what he had said at several times on the subject of the riots, and of a speech which he addressed to the populace on the afternoon of the 16th of August, at a place about a minute's walk from Mr. Aitkin's house, at which this fire took place. With respect to some of the other prisoners, evidence was given that they applied lighted torches to the house and set it on fire.

The defence of Ellis was an alibi.

TINDAL, C. J., (in summing up the case as to the prisoner Ellis), said—If you are dissatisfied with the testimony which he has produced, and you think that he is attempting to prove that which is not true, you have then to consider whether Goodwin has proved that he was there, and next whether he was there with the guilty intention of aiding and assisting the mob.

The jury found the prisoner Ellis and sixteen of the other prisoners guilty.

Allen, for the prisoner Ellis.—I wish to mention a point in this case, which I ought to have made at an earlier stage of it. This is an indictment for demolishing and for beginning to demolish a house—the mean of destruction being that of fire. And I believe that, in cases where the offence charged has been the “setting fire” to a house, it has been held that persons who have come up after the fire has commenced are not principals in the crime of arson, however they may have aided in the transaction by feeding the fire afterwards. Now, the prisoner Ellis is, I admit, tried under a different enactment; but I would

suggest that the same exactitude is required on the one enactment and on the other. There was, in this case, no evidence that the prisoner Ellis was present till long after the demolition had begun, and there is nothing from which the jury could infer that he was at this house at the time of the commencement of the fire; and it is, I apprehend, a general rule that persons, who come up after the completion of a felony, cannot, in law, be held to be principals, however they may be accessories after the fact.

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TINDAL, C. J.—If I felt the force of the objection, I would certainly reserve the point; but it appears to me that your argument fails on the main ground on which you put it forward. You are comparing this to the case of an indictment for arson. It is possible that, if this had been an indictment for burning the house, the objection might have been valid; but this is an offence under an enactment that makes it a felony, if persons riotously and tumultuously assemble together to the disturbance of the public peace, and, when so assembled, destroy a house, therefore it is not simply the fact of destroying a house by fire, but it is the combined fact of riotously assembling together and, whilst the riot continues, demolishing the house. Now, to make a party guilty of that, he must be shewn to be one of those who were present at the offence, or he could not be aiding and abetting. But as it was not only the burning, but also the riotously assembling together, the whole of the prisoner's conduct on that day was before the jury. It was distinctly left to them, that, unless they thought that the prisoner Ellis had, by his language, excited this mob to the act which was the subject-matter of the inquiry, and afterwards been present at it, he was not guilty.

The prisoner Ellis was sentenced to be transported for twenty-one years.

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Follett, S. G., and Waddington, for the Crown.

*F. V. Lee, Meteyard, E. Yardley, W. Johnstone Neale,
and Huddleston, for the respective prisoners.*

[Attornies—*Solicitors for the Treasury*, for the prosecution; and
Williams, Bowen, Brown, Whalley, and Roberts, for the respective
prisoners.]

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A witness for
the prosecution
in a case of
felony may be
asked in cross-
examination
whether he has
not stated cer-
tain facts before
the grand jury,
and the witness
is bound to
answer that
question.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for
demolishing an office, the property of Lord Granville.

In cross-examining one of the witnesses for the prosecu-
tion, *Huddleston*, for the prisoner, proposed to ask the
witness whether he had not stated certain facts to the
grand jury.

Godson, for the prosecution.—I submit that the witness
cannot be asked as to what he said before the grand jury.

PARKE, B.—I see no objection to the question, and I
think that the witness is bound to answer it.

The question was put.

Verdict—Not guilty.

Ludlow, Serjt., and Godson, for the prosecution.

Huddleston, for the prisoner.

[Attornies—*Solicitors for the Treasury*, and *Bowen*.]

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ABDUCTION.

Semble, that where a man by false and fraudulent representations induced the parents of a girl, between ten and eleven years of age, to allow him to take her away, such taking away of the girl is an abduction within the meaning of the statute 9 Geo. 4, c. 31, s. 20. *Reg. v. Hopkins*, 254

ACCESSORY.

1. An accessory before the fact to a felony committed on the high seas, within the jurisdiction of the Admiralty of England, may be indicted and tried at the Central Criminal Court, by virtue of the statutes 7 Geo. 4, c. 64, s. 9, and 4 & 5 Will. 4, c. 36, s. 22, although the person charged as the principal offender has not been "committed to or detained in" the gaol of Newgate for his offence. *Reg. v. Wallace*, 200

2. A person may be tried under the statutes 7 Will. 4 & 1 Vict. c. 89, ss. 6 & 11, as an accessory before the fact to the offence of setting fire to a vessel, of which he was at the time a part owner. *Ibid.*

3. An indictment is properly framed, which states that the principal felon cast away and destroyed a vessel, and

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that the accessory incited, moved, aided, counselled, hired, and commanded him to do it; and the accessory may be convicted on an indictment so framed, although the principal felon has not been tried, and does not appear to be amenable to justice. *Ibid.*

4. A servant let a person into his master's house on a Saturday afternoon, and concealed him there all night, in order that he might rob the house; and on the Sunday morning left the premises in pursuance of the previous arrangement. The man, in the servant's absence, broke into the bedroom of the master and stole the contents of his cash-box:—*Held*, that the man who took the property from the cash-box was rightly charged as a thief, and the servant who let him into the house as an accessory before the fact. *Reg. v. Tuckwell*, 215

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1. A plaintiff, by his notice to admit, called on a defendant to admit an authority to sell an estate "signed by defendant," and dated "10th August, 1840;" and the judge by consent made the usual order to admit it. When the document was given in evidence, the date, "August," appeared to be written on an erasure:—*Held*, that the defendant, by this admission, had precluded himself from calling on the plaintiff to give evidence to explain the altered date. *Poole v. Palmer*, 69

2. *Semble*, that, by an admission of this kind, the accuracy of the document is conceded. *Ibid*.

3. In an action on a bill of exchange, the defendant was, by a judge's order (in the usual form), to make the admission specified in the notice to admit, and the notice called on the defendant to admit that the document therein "specified to be original, was written, signed, or executed, as it purports to have been, saving all just exceptions to the admissibility of such document as evidence in this cause." The notice then described the bill of exchange in the usual manner:—*Held*, that this admission did not preclude the defendant from objecting that the bill was not properly stamped, and also that this was not such an admis-

sion as dispensed with the production of the bill. *Vain v. Whittington*, 484

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An agreement in writing, made by proper authority, contained in the body of it the names of all the contracting parties, and concluded: "In witness whereof we have hereto set our hands, &c.;" but there was not any signature at the foot of the agreement by any one:—*Held*, that the agreement was not signed by the parties to be charged under the provisions of the Statute of Frauds, because the names were inserted of necessity in the body of the agreement to make sense of it, and should not be used over again as signatures; and because it appeared from the whole of the document that the parties had not intended it to be binding upon them until the names had been signed at the foot of the paper. *Hubert v. Turner*, 351

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1. On the trial of an action against officers of a court of requests, the Nisi Prius record contained only a

plea of not guilty, without the words "by statute" being added. The defendant's counsel wished to amend, by adding the words "by statute" to the *Nisi Prius* record. The judge would not allow the amendment, as it could not be shewn that the words "by statute" were on the defendant's plea; but *semble*, that, if it could have been shewn that the words "by statute" had been in the issue delivered by the plaintiff's attorney, the judge would have allowed the amendment. *Forman v. Dawes*, 127

2. In replevin upon a taking of goods in a public-house and a brewery, there was an avowry as to the taking in the public-house only (omitting the brewery). The judge at the trial would not allow the avowry to be amended by inserting the brewery. *Bye v. Bower*, 262

3. The 23rd section of the stat. 3 & 4 Will. 4, c. 42, does not extend to the amending of *omissions* in pleading. *Ibid.*

4. An affidavit was sworn in a cause of the Commissioners of Charitable Donations and Bequests in Ireland, against J. E. D.; and in an indictment for perjury on it, the affidavit was alleged to be intitled in that cause. The affidavit was intitled the "Commissioner," instead of "Commissioners;" but the Lord Chief Justice allowed an amendment of the indictment to obviate an objection as to this variance. *Reg. v. Christian*, 388

APPOINTMENT.

1. The jurisdiction, to determine whether a married woman has power to make an appointment in the nature of a will, belongs to the Queen's temporal Courts. *Tucker v. Inman*, 82

2. It is necessary that administration, in some degree, should be granted, before the Court of Chancery will adjudicate on the validity of

a testamentary appointment made by a married woman. *Ibid.*

3. And if a married woman have a power of appointment over a particular amount of property, and that property is purchased by A. B., the Court of Chancery will adjudicate respecting it, whether the Prerogative Court grant letters *limited* to that amount only, or give *general* letters of administration. *Ibid.*

4. In the case where a married woman has a power of appointment over a certain amount of property bequeathed, the Prerogative Court will not grant to A. B. (he not being the husband of the deceased nor executor) administration *ceterorum*, but *only limited* to the amount in question. *Ibid.*

5. Where, in prohibition, there is a special traverse of the allegation of the practice of the Court of Chancery, respecting the will "so made by Sarah Inman," namely, that it was not necessary, before that Court would proceed to adjudicate, that *limited* letters of administration should be granted, the traverse is made out by shewing that in *this case* the Prerogative Court will not grant more than *limited* letters to the party in question, although it be shewn that the Court of Chancery would adjudicate if the letters of administration had been *general*. *Ibid.*

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In a case of arson, it appeared that a small faggot was set on fire on the boarded floor of a room, and the faggot was nearly consumed; the boards of the floor were "scorched black, but not burnt," and no part of the wood of the floor was consumed:—*Held*, that this was not a sufficient burning to support an indictment for arson. *Reg. v. Russell*, 541

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See MURDER, 4.—WOUNDING, 3, 4.

1. If one man strikes another a blow, that other has a right to defend himself and to strike a blow in *his defence*, but he has no right to *revenge himself*; and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and battery. *Reg. v. Driscoll*, 214

2. The burglariously breaking and entering a dwelling-house, with intent to commit a rape, is not a crime that includes an assault; and therefore, in an indictment for such a burglary, the prisoner cannot be convicted of an assault under the stat. 1 Vict. c. 85, s. 11. *Reg. v. Watkins*, 264

3. Action for assault. Plea, that the plaintiff entered the defendant's close without leave and license, and that the defendant ordered him off: but he not going, the defendant *moliter manus*, &c. Replication, *de injuriâ*:—*Held*, that under this plea it is not necessary for the defendant to rebut all leave and license, because that is not material to the issue, the defendant's justification being complete, if he can shew that he required the plaintiff to leave the close, and the plaintiff refused to do so, although the plaintiff had, in fact, entered at first by the leave and license of the defendant, that leave and license lasting only during the defendant's pleasure. *Jelly v. Bradley*, 270

4. In a case of manslaughter, the

prisoner cannot be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85, unless that assault is the subject-matter of the charge, and embodied in the charge, and which would itself have been the felony, but for some other cause; and the jury ought not, on a charge of manslaughter, to convict the prisoner of an assault, unless that assault conduced to the death of the deceased, although the death was not manslaughter. *Reg. v. Crumpton*, 597

ASSAULT, WITH INTENT TO ROB.

An indictment for an assault, with intent to rob, which charges that the prisoner, in and upon R. B. "feloniously did make an assault, with intent the monies, goods, and chattels of the said R. B., from the person and against the will of him, the said R. B., then and there feloniously and violently to rob, steal, take, and carry away, against the form of the statute," &c., is good. *Reg. v. Huxley*, 596

Form of indictment.

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ATTEMPT TO COMMIT MISDEMEANOR.

A man went into a pawnbroker's shop in the middle of the day, and laid down eleven thimbles on the counter, saying, "I want five shillings on them." The pawnbroker's assistant asked the man if they were silver, and he said they were. The assistant tested them, and found they were not silver, and in consequence did not give the man any money, but sent for a policeman, and gave him into custody:—*Held*, that the conduct of the man who presented the thimbles amounted to an attempt to commit the statutable misdemeanor of obtaining money under false pretences, and by consequence that, if

money had been obtained, that statutable offence would have been complete. *Reg. v. Ball*, 249

AUCTION.

In the sale of certain lots of goods by auction, the conditions of sale prefixed to the auctioneer's catalogue were, among others, that the goods were to be paid for before delivery, and to be cleared off the premises by a certain day:—*Held*, in the absence of evidence of a specific stipulation to that effect, that the law would not imply a custom that the purchaser should inspect and measure the goods knocked down to him before he paid for them; and that the words of the catalogue, "before delivery," meant before delivery for any purpose, whether to measure or to clear away. *Secus*, where the goods are bought by sample, in which case the purchaser has a right, before payment, to see that the bulk corresponds with the sample. *Pettitt v. Mitchell*, 424

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1. A boarding and lodging-house keeper, who also keeps a stock of wine, which she supplies to her boarders and lodgers, by a bottle at a time, as each of them may require it, is a hotel-keeper under sect. 2 of the Bankrupt Act, 6 Geo. 4, c. 16, and as such subject to the bankrupt laws. *Gibson v. King*, 458

2. A person, by suffering judgment to go by default, does not "procure" his goods to be taken in execution under sect. 3 of the Bankrupt Act, 6 Geo. 4, c. 16, so as to be an act of bankruptcy, although his goods be afterwards taken in an execution sued out upon that judgment. *Ibid.*

3. A person's "procuring" his goods to be taken in execution has no effect as an act of bankruptcy till the goods are actually taken. *Ibid.*

4. A fiat in bankruptcy issued on the 7th of March, 1842, and in an action of trover by the assignees for goods pledged by the bankrupt on the 28th of February, the trading was disputed. The bankrupt was a boarding-house keeper, and sold wine to her boarders:—*Held*, that a paper in the handwriting of the bankrupt, purporting to be an account between her and one of her boarders, from December, 1840, to May, 1841, was not receivable in evidence to prove the trading, unless it could be shewn to have been written before the bankruptcy; and held also, that a book containing accounts between the bankrupt and one of her boarders, of dates all antecedent to the bankruptcy, and to which the word "settled" was added in the bankrupt's handwriting, was also not receivable in evidence, unless it was shewn that the entries were written before the bankruptcy. *Ibid.*

5. If in an action of trover by assignees of a bankrupt the defendant plead that the plaintiffs are not assignees, the plaintiffs may, on that issue, give evidence of any act of bankruptcy committed before the date of the fiat,

although such act of bankruptcy be later in date than the transaction which is relied on as the conversion by the defendant. *Ibid.*

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1. In an action of trespass to land the defendants pleaded not guilty, and a right of way. The plaintiffs replied *de injuriâ* to the plea of the right of way; and newly assigned, that the trespasses were committed "on other and different occasions" than that in the second plea mentioned. The defendants pleaded to the new assignment a payment of money into Court, and by this plea relinquished and abandoned *so much* of the general issue "as *traverses* or denies, or can be deemed or construed to traverse or deny the said trespasses newly assigned, or any part thereof." Replication to this plea, accepting the sum paid into Court, "in full satisfaction and discharge of the said several trespasses above newly assigned:"—*Held*, that, as the plea of not guilty was not entirely withdrawn, the plaintiff had the right to begin; and that, if in a case like this the defendant wished to begin, he should take out a summons, and, by a judge's order, withdraw the general issue entirely from the record. *Price v. Seaward*, 23

2. If in an action on a life policy the defendants plead that at the time of the declaration of health and the policy the habits of the person whose life was insured were immoderate and intemperate, and that he was addicted to excessive drinking: Replication, that his habits were moderate and tem-

perate, and not immoderate and intemperate, and that he was not addicted to excessive drinking:—*Held*, that on these pleadings the plaintiff should begin, as there was an affirmative on both sides. *Craig v. Penn*, 43

3. In an action by the indorsee against the maker of a promissory note, the defendant pleaded that the note was in the hands of G. V., and that, while it was so, the claim of G. V. on this note was by an order of Nisi Prius referred to an arbitrator; and that, before any award was made, the note was in violation of good faith delivered to the plaintiff; and that the plaintiff, at the time he took the note, had full knowledge of all the premises: Replication, that the plaintiff had not any knowledge of the premises:—*Held*, that, on these pleadings, the defendant must begin, as the plaintiff's knowledge of the facts was an essential part of the defence. *Smith v. Martin*, 58

4. If a declaration on promissory notes, by indorsee against drawer, contains counts on the notes only, without any other count, and the defendant plead, as to part of the amount, payment of that sum while the payee was the holder of the notes, and, as to the residue, a payment of a further sum into Court, and that the plaintiff has sustained no greater damages: Replication to the first plea, that the payment was not made while the payee was the holder of the notes; and to the second plea, that the plaintiff had sustained greater damages:—*Held*, that if the first issue had stood alone, the defendant would have been entitled to begin, but that the second issue entitled the plaintiff to begin, although it was stated by the defendant's counsel, that, if the defendant succeeded on the first issue, the plaintiff, as matter of calculation, could not be entitled to any thing on the second issue. *Cripps v. Wells*, 489

BENEFIT SOCIETY.

See LARCENY, 7.

BIGAMY.

1. If in a case of bigamy there be a discrepancy between the Christian name of the prisoner's first wife, as laid in the indictment, and as stated in the copy of the register, which is produced to prove the first marriage, the prisoner must be acquitted; *unless* that discrepancy can be explained, or, in the absence of such proof, unless it can be shewn that the first wife was known by both names. *Reg. v. Gooding*, 297

2. In a case of bigamy it appeared that the prisoner's first wife had left him sixteen years ago; and it was proved by the second wife that she had known him nine years living as a single man, and that she had never heard of the first wife, who, it appeared, had been living seventeen miles from where the prisoner resided:—*Held*, that on this evidence the prisoner ought to be acquitted on the proviso contained in the 22nd section of the 9 Geo. 4, c. 31. *Reg. v. T. Jones*, 614

BILL (IGNORED).

See INDICTMENT, 9.

BILL OF EXCHANGE AND PROMISSORY NOTE.

See BEGIN (RIGHT TO), 3, 4.—WITNESS, 8.

1. A paper was in the following form, "I, R. J. M., owe Mrs. E. the sum of £6, which is to be paid by instalments, for rent. (Signed) R. J. M.:"—*Held*, not to be a promissory note, as no time was stipulated for the payment of the instalments. *Mufsat v. Edwards*, 16

2. If in assumpsit on a bill of exchange by indorsee against acceptor,

with a count upon an account stated, the defendant plead to the first count that he did not accept, and do not plead at all to the second count, and the award of venire be in the usual form to try; the judge at Nisi Prius will try the issue joined, and, if a verdict pass for the plaintiff, a nolle prosequi should be entered as to the count upon an account stated: *Luckie v. Gompertz*, 55

3. Where, after an action is brought by the indorsee of a bill of exchange against the acceptor, the drawer pays the acceptor part of the amount, the indorsee (unless he be suing as a trustee for the drawer) should take a verdict against the acceptor for the balance and interest only, and when he is paid, he should give the bill up to the drawer. *Hemming v. Brook*, 57

4. The plaintiffs sold horses to the defendant on the 10th of March, 1840, and in payment the defendant gave a cheque on his bankers, which the plaintiffs crossed to their own bankers and paid in to them on the 11th of the same month. The defendant's bankers did not use the clearing-house in Lombard-street, and accordingly the plaintiffs' bankers presented the cheque to the defendant's bankers on the 12th, whereas, otherwise, they would have presented it at the clearing-house on the evening of the 11th. The defendant's bankers had stopped payment on the 12th:—*Held*, that the bankers of the plaintiffs had acted in strict accordance with the rules of mercantile law; but that the plaintiffs themselves had been guilty of laches in not paying the cheque to their bankers on the 10th, if they received it within banking hours. *Alexander v. Burchfield*, 75

5. If a party makes a promissory note, whereby he promises to pay the plaintiff, or order, "£600, with interest thereon, at the rate of six per cent. per annum, twelve months after

date," the judge will advise the jury, in allowing interest up to the time of signing judgment, to allow it at the rate of five per cent. only. *Ward v. Morrison*, 368

6. A notice of dishonour, addressed to the defendant, stating, that "your draft upon Mr. G. C. for £50, due 3rd March, is returned to us unpaid, and, if not taken up in the course of this day, proceedings will be taken against both you and him for the recovery thereof," is a good notice of dishonour. *Robson v. Curlewis*, 378

7. If a bill of exchange or promissory note be drawn, accepted, or indorsed, by one of two persons who are partners in a business which is not a trade (e. g. as attorneys), in the name of the firm, and the partner, who did not write the names of the firm, by his plea deny the drawing, acceptance, or indorsement respectively, the plaintiff must give evidence of the authority of the other partner to draw, accept, or indorse in the name of the firm; but in the case of a commercial firm this is not necessary, as there is a general authority. *Levy v. Pyne*, 453

8. P. & R., who were in partnership as attorneys, were sued as the indorsers of a promissory note indorsed by P. in the name of the firm. P. suffered judgment by default, and R. pleaded that he did not indorse:—*Held*, that in order to shew an authority in P. to indorse notes in the name of the firm, parol evidence could not be given of other bills and notes drawn, accepted, or indorsed in a similar manner and paid by the firm, as shewing a course of dealing; but that each bill and note must be produced or accounted for; and that such of the bills or notes as had been given up to the defendants when paid, might be called for under a notice to produce, and, if not produced, secondary evidence might be given of their contents. *Ibid.*

9. *Held* also, that evidence might be given of bills and notes (which were produced) which had been drawn, accepted, or indorsed by R. in the name of the firm, and which were afterwards paid by the firm, as this was evidence of a mutual authority for each partner to draw, accept, and indorse notes and bills in the name of the firm. *Ibid.*

10. In an action on a promissory note, the note purported to be "For value received in Pennance shares, pursuant to annexed contract;" no contract was in fact annexed:—*Held*, that this special description of the consideration for the note did not render it incumbent on the plaintiff to put in any contract or other document beside the note itself, in order to establish his case. *Fox v. Frith*, 502

11. The defendant's father owed the plaintiff money for goods sold; and for the price of these goods the defendant made his promissory note in his own name, and gave it to the plaintiff, who was cognizant of all the facts, and that the defendant had received no consideration for the note:—*Held*, that the above circumstances could not be given in evidence under a plea of "accommodation bill," and that there was in this case an original liability on the part of the defendant, and that for a good consideration, viz. family affection. *Cook v. Long*, 510

12. A paper in the following form, "W. W. lent to J. R. the sum of 19l. 19s. 11d. to receive 5 per cent. for the same 19l. 19s. 11d.; to pay on demand to the said W. W., giving J. R. six months' notice for the same," is a promissory note, and not an agreement. *Walker v. Roberts*, 590

BIRTH (CONCEALMENT OF).

See CONCEALMENT OF BIRTH.

BOARD AND LODGING.

A. placed his son with B., a chemist

and druggist, who intended to pass his examination at Apothecaries' Hall, but was delayed in so doing by ill health. It was intended that A.'s son should be apprenticed to B., but he stayed for five years with B., having his board and lodging, and being taught the business of a chemist and druggist, and he then left B., and was never apprenticed to him:—*Held*, that, to entitle B. to recover for the board, lodging, and teaching of A.'s son, the jury must be satisfied that A.'s son was placed with B. upon an agreement or understanding that B. was to be paid for his board and lodging and for teaching him; but if the jury were not so satisfied, or if they thought that A.'s son was not to be paid for till B. had passed his examination at Apothecaries' Hall, and that A.'s son was then to be apprenticed to B. as an apothecary:—*Held*, that B. was not entitled to recover any thing for the board and lodging and teaching during the five years. *Attwaters v. Courtney*, 51

BOARDING-HOUSE KEEPER.

See BANKRUPT, 1.

BRIDGE.

A bridge had been built before 43 Geo. 3 over a stream of water. The stream was never known to be dry, but in the winter its depth only averaged two-and-a-half feet. It was part of a sheet of water crossing low land, and at the place where the bridge crossed it, it was confined by embankments to prevent it from overflowing the adjoining meadows. The judge left it to the jury whether this structure were a bridge over a stream of water, for, if so, it was not necessary that it should be for the convenience of the public under 43 Geo. 3, c. 59, s. 5, but the county were liable to repair it. *Reg. v. The Inhabitants of Gloucestershire*, 506

BURGLARY.

See INDICTMENT, 1, 6.

1. A servant pretended to concur with two persons, who proposed to him to unite with them in robbing his master's house. The master being out of town, the servant communicated with the police, and acted under their instructions. In consequence of this, a little after 9 o'clock one evening, he let in one of the persons by lifting the latch, but before that person had taken any property he was seized by the police, and, a crowbar being found upon him, was immediately placed in confinement. After this the servant went out again and fetched the second person, and let him in in the same manner. This person was seized with a basket of plate in his hand, which he had carried from the kitchen part of the way up-stairs:—*Held*, that neither of the persons could be convicted of burglary; but that the one who was seized with the plate might be convicted of stealing in a dwelling-house, and also that the other might be indicted as an accessory before the fact to such stealing. *Reg. v. Johnson*, 218

2. The burglariously breaking and entering a dwelling-house with intent to commit a rape, is not a crime which includes an assault; and therefore in an indictment for such a burglary the prisoner cannot be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85. *Reg. v. Watkins*, 264

3. An indictment charged a prisoner with having burglariously broken and entered a dwelling-house, "with intent one A. D. in the said dwelling-house then being violently and against her will *then and there* feloniously to ravish and carnally know;" whether that allegation is sufficient without the addition of the words, "in the

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said dwelling-house," after the words "then and there,"—*quare. Ibid.*

BURNING.

See ARSON.

CARRIER.

See NEGLIGENCE, 5.

1. Silk dresses made up for wearing are not "silks" within the meaning of the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 61, s. 1: nor are an eye-glass with a gold chain attached to it, for the purpose of its being hung round the neck of the wearer, "trinkets" within the meaning of that enactment. *Davey v. Mason*, 45

2. If a message be left at the booking-office of a carrier from N. to L. for his van to call for the plaintiff's luggage, at another inn, for the purpose of its being carried to L., and the carrier's servant and van go to the other inn, and the plaintiff's luggage be there put into the carrier's van and afterwards lost therefrom, the carrier is liable for the loss, just as he would be if the luggage of the plaintiff had been taken to the defendant's regular booking-office. *Ibid.*

CENTRAL CRIMINAL COURT.

See ACCESSORY, 1.—JUROR, 1.

Rule as to the issuing of process. 254

CERTIFICATE FOR SPEEDY EXECUTION.

See EXECUTION, 1.

CESTUI QUE TRUST.

See EJECTMENT, 2.

CHALLENGE OF JURORS.

See ISSUE FROM THE COURT OF CHANCERY, 3.—JUROR, 2.

COMPUTUS (ANCIENT).

CHARTER-PARTY.

See SHIPPING, 1, 2, 3, 4.

CHEQUE.

See BILL OF EXCHANGE, 4.—MONEY HAD AND RECEIVED.

CHINESE WITNESS.

Mode of swearing. 248

COIN (OFFENCES RELATING TO THE).

In order to convict a person charged on the stat. 2 Will. 4, c. 34, s. 8, with having in his possession more than three pieces of counterfeit coin, with intent to utter them, it is not necessary that the possession should be individual possession, but it is enough if the coin be in the possession of the person charged, or his immediate agent; as the interpretation clause of the same statute (s. 21) provides for such a case; therefore where two persons were taken into custody together, one of them having on him sixteen pieces of counterfeit coin, and the other only two pieces, the judges held, that the person who had only the two pieces might, in point of law, be convicted as well as the person who had the sixteen. *Reg. v. Williams*, 259

COMBINATION OF WORKMEN.

See L. C. J. TINDAL'S CHARGE, p. 661.

COMMON PURPOSE.

See L. C. J. TINDAL'S CHARGE, p. 661.—WOUNDING, 2.

COMMONS (OFFICERS OF THE HOUSE OF).

See TRESPASS, 6.

COMPUTUS (ANCIENT).

See EVIDENCE, 2.

CONCEALMENT OF BIRTH.

If a woman endeavour to conceal the birth of her child by placing the dead body of the child between a bed and a mattress, this is a sufficient disposing of the dead body to constitute an offence within the stat. 9 Geo. 4, c. 31, s. 14, and it is not essential to such an offence that the dead body should either be put in some place intended for its *final* deposit, or be buried or destroyed. *Reg. v. Goldthorpe*, 335

CONFESSION.

See DEPOSITION, 4.

1. A servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two of the bed-rooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner, that if she did not tell the truth about the things found in the pump he would send for the constable to take her, but he said nothing to her respecting the fire:—*Held*, that this was such an inducement to confess as would render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction. *Reg. v. Hearn*, 109

2. The prosecutor proved, that when the prisoner was before the magistrate she was duly cautioned, and that she made a statement, which was taken down and read over to her, and to which she made her mark, the magistrate also signing it. The prosecutor identified the paper by his own signature to his own deposition, being on the same sheet of paper:—*Held*, that the prisoner's statement might be given in evidence without examining either the magistrate or his clerk. *Ibid.*

3. A. B., a witness on a coroner's

inquest, made a deposition, in which she stated a conversation with the prisoner on their seeing a placard relating to the murder of the deceased, and also stated that she called the prisoner a murderer; and also that she slept with the prisoner, and that he beat her, and gave her two black eyes. The prisoner made a statement before the coroner, which was taken down in the following form:—"Prisoner admits sleeping with witness, blacking her eyes, seeing the placard, and his beating her, and her calling him murderer." *Semble*, that the statement of the prisoner, and also the deposition of A. B., were receivable in evidence against the prisoner on his trial for the murder, and that it was no objection in point of law to the receiving of the statement in evidence, that it began, "Prisoner admits," although that is a very improper way of taking down a prisoner's statement. *Reg. v. Roche*, 341

4. A female servant being suspected of stealing money, her mistress on a Monday, told her that *she* would forgive her if she told the truth. On the Tuesday she was taken before a magistrate, and was discharged, no one appearing against her. On the Wednesday, the superintendent of police went with her mistress to the bridewell and told her, in the presence of her mistress, that she "was not bound to say anything unless she liked, and that if she had anything to say her mistress would hear her;" but the superintendent (not knowing that her mistress had promised to forgive her) did not tell her that if she made a statement it might be given in evidence against her. The prisoner made a statement:—*Held*, that this statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement; but that if the mistress

had not been then present it might have been otherwise. *Reg. v. Hewett*, 534

5. The mere knowledge by a prisoner of a handbill, by which a government reward and a promise of a pardon are offered in a case of murder, are not sufficient grounds for rejecting a confession of such prisoner, unless it appear that the inducements there held out were those which led the prisoner to confess. *Reg. v. Boswell*, 584

6. Where a prisoner desired that any handbill that might appear concerning a murder with which he stood charged might be shewn to him, and a handbill was shewn to him by a constable, by which a reward and free pardon was offered to any but the person who struck the blow, and the prisoner, three days afterwards, made a statement. This statement was held to be receivable in evidence. *Ibid.*

7. But where it was afterwards proved by another constable that the prisoner, on the night before he made the statement said to him that he saw no reason why he should suffer for the crime of another, and that, as government had offered a free pardon to any one concerned who had not struck the blow, he should tell all he knew about the matter. The judge held, that the statement that had already been given in evidence was not properly receivable, and struck it out of his notes. *Ibid.*

8. If two prisoners be taken before a magistrate on a charge of felony, what the first prisoner says in his statement before the magistrate cannot be read in evidence against the second, because when before the magistrate, the second prisoner is only called upon to answer the statements in the depositions taken on oath, and not what any other prisoner may have said in his examination. *Reg. v. Swinnerton*, 593

CONSPIRACY.

An indictment for a conspiracy charged the defendant with conspiring, with other persons unknown, "to cheat and defraud *J. D. and others*," and laid, as overt acts, that the defendant did falsely pretend to *J. D.* that he was a merchant named *G.*, and did under colour of a pretended contract with *J. D.* for the purchase of certain goods of "the said *J. D. and others*," obtain a large quantity of the goods "of the said *J. D. and others*," with intent to defraud "the said *J. D. and others*:"—Held, that the words "and others" throughout this indictment must be taken to mean *others the partners of J. D.*, and not other persons wholly unconnected with *J. D.*; and that on the trial of this indictment evidence was not admissible to shew that the defendant attempted to defraud other persons wholly unconnected with *J. D.* *Reg. v. Steel*, 337

CONSTABLE.

See FALSE IMPRISONMENT, 5.—
MURDER, 4.

1. A person charged to aid a constable, and who does so, is protected *eundo, morando, et redeundo*. *Reg. v. Phelps*, 180

2. To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove—1st, that the constable saw a breach of the peace committed; 2nd, that there was a reasonable necessity for calling on the defendant for his assistance; and 3rd, that when duly called upon to assist the constable, the defendant, without any physical impossibility or lawful excuse, refused to do so; and in such a case it is no ground of defence that from the number of the rioters the single aid of the defendant would not have been of any use. *Reg. v. Brown*, 314

3. Form of indictment. *Ibid.*

CONTRA FORMAM STATUTORUM.

See INDICTMENT, 4.

CONVICTION (PRIOR).

See LARCENY, 13.

CONVICTION (PROOF OF).

See EVIDENCE, 13.

CORPORATION.

See TRESPASS, 8.

COSTS.

A party refused to admit the handwriting of a third person to a document. The judge at chambers made the usual order for the costs of proving it at the trial; the handwriting of the document was proved, but the document itself was one which was not receivable in evidence in the cause. The judge at Nisi Prius would not certify for the costs of proving it. *Phillips v. Harris*, 492

CRIM. CON.

See LARCENY, 1, 2, 3, 4.

1. In an action for crim. con. the marriage was proved to have been solemnized at the office of the British consulate at Beyrout, but there was some doubt whether it had been solemnized strictly according to the rites of the Church of England: it was not solemnized according to the custom of the country in which it took place. The parties lived as husband and wife for two years afterwards:—*Held*, that, for the purposes of the jury's verdict, this must be considered a marriage in fact. *Catherwood v. Caslon*, 431

2. The writ in an action for crim.

con. was dated 11th December, 1840; there had been suspicious circumstances touching the conduct of the plaintiff's wife and of the defendant before that time, and they had both left this country about June, 1840. It was not shewn that they had left this country together. In August, 1841, the parties lived in open adultery in England. The judge directed the jury that they must dismiss from their minds every thing which might have occurred after the date of the writ, i. e. in and after August, 1841, and they must infer the adultery, or repudiate it, by what had happened before 11th December, 1840. *Ibid.*

DAMAGES.

See BILL OF EXCHANGE, 5.—GOODS BADLY MADE.

Although, where a fact is admitted as to one issue on the record, and denied as to another, the admission on the one issue is not evidence on the other; yet if the jury find both issues for the plaintiff, they may, in estimating the damages on the whole case, take into their consideration what appear on the whole case to be the real facts of it. *Howard v. Gossett*, 380

DAMAGE (SPECIAL).

See SLANDER, 3.

DAMAGE (WILFUL).

See LANDLORD AND TENANT, 1.

DEEDS.

The person who is entitled to the inheritance has a right to the possession of the title deeds, and it is no answer to an action, founded on his right to the possession of the deeds, to shew that another person has a term of 1000 years vested in him to attend the inheritance. *Austin v. Croome*, 653

DEMOLISHING HOUSES.

1. On an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for beginning to demolish, pull down, or destroy any house, &c., the jury cannot find the persons guilty, unless they think that their intention was so to destroy the house as, in fact, to leave it no house at all. No injury, however extensive, short of the actual demolition of the very walls of the building, is contemplated by the provisions of this act. *Reg. v. Adams*, 299

2. On an indictment on the statute 7 & 8 Geo. 4, c. 30, s. 8, for feloniously demolishing a house by rioters, it is a sufficient demolishing of the house, if it be so far destroyed as to be no longer a house, and the fact that the rioters left a chimney standing will make no difference. *Reg. v. Langford*, 602

3. The stat. 7 & 8 Geo. 4, c. 30, s. 8, not having given any definition of what shall be a riot within the meaning of that enactment, the common-law definition of a riot must be resorted to, and in such a case there will be sufficient terror and alarm to support this part of the charge if *any one* of her Majesty's subjects was terrified. *Ibid.*

4. If persons riotously assemble and demolish a house *really believing* that it is the property of one of them, and act *bond fide* in the assertion of a supposed right, this will not be a felonious demolition of the house within the stat. 7 & 8 Geo. 4, c. 30, s. 8, even though there be a riot. *Ibid.*

5. If rioters destroy a house by fire, this is a felonious demolition of it within the stat. 7 & 8 Geo. 4, c. 30, s. 8, and the persons guilty of such an offence may be convicted in an indictment founded on that enactment, and need not be indicted for arson under sect. 2 of that statute. *Reg. v. Harris*, 661

6. If in a case of feloniously de-

molishing a house by rioters, it appear that some of the prisoners set fire to the house itself, and that others carried furniture out of the house and burnt it in a fire made on a gravel walk on the outside of the house, it will be for the jury to say whether the latter were not encouraging and taking part in a general design of destroying the house and furniture, and, if so, the jury ought to convict them. *Ibid.*

7. If a house be demolished by rioters, by means of fire, one of the rioters who is present while the fire is burning may be convicted for the felonious demolition, under the stat. 7 & 8 Geo. 4, c. 30, s. 8, although he is not proved to have been present when the house was originally set on fire. *Reg. v. Simpson*, 669

DEMURRAGE.

See SHIPPING, 1, 2, 3.

DEMURRER.

See PERJURY, 15.

1. A prisoner, in case of murder, may demur; and if his demurrer be overruled, he may still plead not guilty; and *semble*, that he may demur and plead over to the felony at the same time. *Reg. v. Phelps*, 180

2. It is competent for a prisoner to demur and plead over to the facts of an indictment at the same time. *Reg. v. Adams*, 299

3. A defendant in an indictment cannot after plea take advantage of any defect which is aided *after verdict*; by the 21st. sect. of the stat. 7 Geo. 4, c. 64, the only mode of taking advantage of such defects being by demurrer. *Reg. v. Ellis*, 564

4. Where a prisoner in a case of felony has in the absence of his counsel pleaded to an indictment which is objectionable on demurrer, the judge will on the application of the prisoner's counsel allow the prisoner to

demur before the evidence is gone into. *Reg. v. Purchase*, 617

5. In a case of embezzlement, if the prisoner demurs to the indictment and the demurrer is decided against him, the prisoner may plead over and take his trial. *Ibid.*

DEPOSITION.

See CONFESSION, 3.

1. On the trial of a case of felony, where the prosecutor is bed-ridden, and not likely to be ever able to attend the assizes, his deposition, taken by the committing magistrate in the presence of the prisoner, may be given in evidence; and the deposition may be proved by a person who was present, without calling the magistrate or his clerk. *Reg. v. Wilshaw*, 145

2. When a deposition, taken before a magistrate, is to be given in evidence, it is very proper, as matter of caution, that the magistrate or his clerk should be called in all cases where it can be conveniently done; but it is not necessary in point of law. *Ibid.*

3. If a witness is *actually insane* at the time of the trial of an indictment for a misdemeanor, his deposition, taken before the committing magistrate, is receivable in evidence, the same as if the witness were dead, although the insanity of the witness *may* be only temporary; but if it appear that the witness be *not insane*, but that the witness has been suffering from delirium and depression of spirits, in consequence of a blow on the head, and that his intellects are affected by the injuries he has received, but it be the opinion of his physician that he will recover, the deposition of the witness, taken before the committing magistrate, is not receivable in evidence. *Reg. v. Marshall*, 147

4. A prisoner was tried for the murder of her child, E. S., by poison. E. S. died on the 25th of September,

on the 14th of October following another child of the prisoner, named M. A. S., died under suspicious circumstances, and the prisoner was examined on oath at the coroner's inquest held on M. A. S. and signed her deposition, in which she made a statement as to the death of E. S. Whether this deposition was receivable in evidence on the trial of the prisoner for the murder of E. S.—*quære*. *Reg. v. Sandys*, 345

DEPOSITION BEFORE THE MASTER.

To let in the examination of a witness taken before the Master, as evidence under the stat. 1 Will. 4, c. 22, on the ground that the witness is abroad, evidence must be given to satisfy the judge that the witness is actually out of the jurisdiction of the court at the time of the trial; and it will not be sufficient to prove that on the evening before the trial the witness was with his luggage on board a ship bound for Montreal, the ship being then three quarters of a mile below Gravesend, waiting for her captain to come on board. *Carruthers v. Graham*, 5

DETINUE.

A. left a picture which was his property in the rooms of C., who was an auctioneer. B. was in company with A. when he went to C.'s rooms with the picture; B. owed C. £8. When A. wanted the picture back and offered to pay for the warehouse-room, C. said the cost of keeping it was 5s., but that he would not deliver the picture up unless he was paid B.'s debt in addition to that sum:—*Held*, that this was a waiver of the demand for warehouse-room; and that detinue would lie by A. against C. for the picture, without any further offer to pay C. for keeping it. *Dirks v. Richards*, 626

DEVISE.

See POWER.

DEVISAVIT VEL NON.

See ISSUE FROM THE COURT OF
CHANCERY.

DISCHARGE OF PRISONER.

See PRISONER (DISCHARGE OF).

DISHONOUR (NOTICE OF).

See BILL OF EXCHANGE, 6.

DISTRESS.

See LANDLORD AND TENANT, 7.

DOOR BELLS (RINGING).

See FALSE IMPRISONMENT, 1.

EJECTMENT.

See EVIDENCE, 1, 22.—EVIDENCE
IN REPLY, 1.

1. In ejectment to recover five houses, it was proved that the lessor of the plaintiff had received the rents of some of them for four quarters, and of the others for five quarters, down to March, 1841, and that in that month the lessor of the plaintiff's receiver of rents found the door of one of the houses secured by a chain, and the defendant in it, who said that it was his freehold:—*Held*, that this was evidence to go to the jury on the part of the lessor of the plaintiff; and if there was no evidence given on the part of the defendant, it would be for the jury to consider whether they were satisfied upon this evidence, that the property really belonged to the lessor of the plaintiff. *Doe d. Humphrey v. Martin*, 32

2. The proviso as to cestui que trusts, contained in sect. 7 of the

stat. 3 & 4 Will. 4, c. 27, applies only to cases of declared and express trusts, and not to the case of a person holding under an agreement to purchase. *Doe d. Stanway v. Rock*, 549

3. If a person who has agreed to purchase real property be let into possession, he is a tenant at will, and such tenancy at will is determined by his death; and if after his death his widow, who is also devisee of his real estate, continue in possession, this is not a continuance of his tenancy at will, so as to prevent the operation of that statute; and therefore, in such a case, where the person thus let into possession died more than twenty years before ejectment brought by the representatives of the intended vendor, it was held that it was too late, unless a new tenancy could be shewn in the widow, the first year of whose tenancy was within twenty years before the ejectment; and if such new tenancy were shewn, no demand of possession would be necessary, as such new tenancy would be determined by the death of the widow, which occurred before the ejectment. *Ibid*.

4. Where, after the jury are sworn in an ejectment case, it is discovered that in the *Nisi Prius* record the name of the real defendant has not been substituted for that of *Richard Roe*, but the consent rule and jury process are right, the record ought in strictness to be withdrawn and amended on summons, and then re-entered, but by consent the judge will allow the amendment without withdrawing the record. *Ibid*.

EMBEZZLEMENT.

See DEMURRER, 5.

1. It was proved that a post-office letter-carrier was in the daily habit of calling at the lodge of the G. Infirmary, and there receiving letters, with a penny on each to prepay the post-

age; and that he took them, with the penny, to the G. post-office; and that, during his illness, a person who had performed his duties did the like. There was no evidence of any appointment:—*Held*, in an indictment under the stat. 2 Will. 4, c. 4, s. 1, for embezzling some of the pence thus received, that this was evidence to go to the jury, that the pence were received by the prisoner by virtue of his employment as a letter-carrier. *Reg. v. Townsend*, 178

2. Embezzlement necessarily involves secrecy and concealment. If, therefore, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping is no embezzlement. *Reg. v. Norman*, 501

3. A clerk to a joint-stock banking company, established under the stat. 7 Geo. 4, c. 46, may be convicted of embezzling the money of the company notwithstanding he is a shareholder or partner in such company. *Reg. v. Atkinson*, 525

4. An indictment for embezzlement which charges, in one count, that the prisoner, within six calendar months, *received* three sums, laying a day to the receipt of each, and that, "on the several days aforesaid," the prisoner embezzled the sums, is bad; because it does not shew that the sums were *embezzled* within six months of each other. *Reg. v. Purchase*, 617

5. Whether three acts of embezzlement can be charged in one count, in one indictment, *quære*; but the correct course is to put each charge of embezzlement into a separate count. *Ibid.*

ENDEAVOURING TO CONCEAL A BIRTH.

See CONCEALMENT OF BIRTH.

ERROR.

See PRACTICE, 9.

ESCAPE.

It is a misdemeanor, indictable at common law, to aid a person to escape from custody, though he be confined under the remand of the Commissioners for the Relief of Insolvent Debtors, and not on any criminal charge. *Reg. v. Allan*, 295

EVIDENCE.

See ADMISSION.—BANKRUPT, 4, 5.—BIGAMY, 1.—BILL OF EXCHANGE, 8, 9.—CONFESSION.—CONSPIRACY.—DEPOSITION.—DEPOSITIONS BEFORE THE MASTER.—EJECTMENT, 1.—EVIDENCE IN REPLY.—FALSE IMPRISONMENT, 2.—LIBEL, 1.—MALICIOUSLY SUING OUT A FIAT IN BANKRUPTCY.—MANSLAUGHTER, 2.—MASTER AND SERVANT, 2.—NEGLIGENCE, 5.—NOTICE TO PRODUCE.—PERJURY, 2, 3, 11, 15.—PETITIONING CREDITOR, 1.—POWER, 1.—PRACTICE, 2.—RAPE, 2.—TRESPASS, 5.—VENDOR AND PURCHASER, 3.—WITNESS.

1. A deceased receiver of rents had rendered to his employer annual accounts of the rents received from property at H. The accounts were not signed by any one. One of the accounts was in the handwriting of a deceased clerk, but on it was written, in the handwriting of the receiver, "H. rents;" another account was in the handwriting of the son of the receiver, who proved that he made it out by the authority of his father, and that the account was rendered to the employer, as was the usual course:—*Held*, that, under these circumstances, both these accounts were receivable in evidence as the accounts of a deceased agent charging himself to his principal. *Doe d. Sturt v. Mobbs*, 1

2. In assumpsit for tolls, a computus of a prepositus or reeve of 33 Hen. 6, which was brought from the muniment room of the lord of the manor, but which was not signed, and of which no evidence of the handwriting could be given, but in which the receiver purported to charge himself with the receipt of money, was offered in evidence:—*Held*, to be receivable. *Brune v. Thompson*, 34

3. The plaintiff claimed tolls throughout the port of Padstow:—*Held*, that a record of K. B., of 7 Ric. 2, of a cause removed by certiorari from the maritime court of Aldestowe, was receivable in evidence for the plaintiff, although that cause was an action of trespass for taking a ship, and the present plaintiff and defendant did not claim under either of the parties to it; and evidence was allowed to be given by the witness who produced it, that he had ascertained from records that Aldestowe and Padstow are different names for the same place. *Ibid*.

4. But the opposite counsel will not be allowed to ask him whether he had not found other records besides those given in evidence, which related to the right of the Prior of B., from whom the plaintiff traced his title, as that would be giving parol evidence of the contents of those records. *Ibid*.

5. A document indorsed in the plaintiff's handwriting, and which the plaintiff had directed a witness to give to the defendant, is good evidence on the part of the defendant, although the instrument be not between the parties on the record. *Agar v. Young*, 78

6. A. brought an action of trespass against B., for taking two tables and a chair. B. pleaded not guilty, and no other plea. It was proved that B. took two chairs and a table in the house of D., but none of the witnesses knew A.; and there was no evidence of any kind to connect A.

with the goods taken in D.'s house:—*Held*, that, to entitle the plaintiff to recover on these pleadings, there must be some evidence to connect the plaintiff with the goods taken; and that, if there was no such evidence, the defendant would be entitled to a verdict on his plea of not guilty. *Forman v. Dawes*, 127

7. A prisoner was to be tried on three indictments: 1st, for receiving stolen tin; 2nd, for stealing iron; 3rd, for receiving stolen brass. It appeared that a constable went with a search-warrant, to search the prisoner's premises for stolen iron, and that, having read the warrant to the prisoner, the latter made a statement:—*Held*, on the trial of the first indictment, that the whole of this statement was receivable in evidence, although part of it related to the charge respecting the iron; and also, that evidence might be given, that, at the time of the search, the prisoner endeavoured to conceal some brass; and also, that almost immediately after the prisoner was taken away from the premises, at the conclusion of the search, his wife carried some tin under her cloak, from a warehouse on the premises. *Reg. v. Mansfield*, 140

8. The rent-rolls of an estate were unsigned, and were drawn out in four columns. The first and second columns, containing the tenants' names, and the amount to be paid by each, were in the handwriting of the owner of the estate. The third and fourth columns, containing the amount actually received of each tenant, and the date when received, were in the handwriting of a deceased steward:—*Held*, that these rent-rolls were receivable in evidence, as accounts of a deceased steward charging himself. *Doe d. Bodenham v. Colcombe*, 155

9. On the trial of an indictment for the non-repair of highways, entries in an ancient parish-book, produced by the churchwarden from the parish

chest, were offered in evidence, to shew who were the surveyors of the highways in 1707:—*Held*, that the evidence was receivable. *Reg. v. Pembroke (Inhab. of)*, 157

10. A minute-book, kept by the magistrates's clerk, was offered in evidence, to shew who had been appointed by the magistrates to be surveyors of the highways for the year 1812:—*Held*, that this evidence was not receivable without proof of a search for the original appointment, under the hands and seals of the magistrates. *Ibid.*

11. Whether the minute-book would have been receivable as secondary evidence, if the original appointments had been lost—*quære. Ibid.*

12. A written resolution of a vestry meeting purported to allow to Mr. D. £50:—*Held*, that evidence was not admissible to prove what was said by the persons who were at the meeting, with a view of shewing what the £50 were allowed for. *Ibid.*

13. A witness, who produced an examined copy of a record of a conviction at the assizes, stated that he examined it with the original record, in the custody of the clerk of assize, but that he thought the original record was written on paper, but was not sure. It was proved, by the son of the clerk of assize, that all the records in his father's custody were written on parchment, but he had no recollection of this particular record:—*Held*, that the examined copy was receivable in evidence. *Ibid.*

14. Where the indictment charged that a person shot at one Harvey Garnett Phipps Tuckett, it was *held*, that Tuckett's card, though given to one of the witnesses in the presence of the party charged, could not be given in evidence against him on his trial to prove the name, as its contents were not shewn to have been communicated to him. *Reg. v. Douglas*, 193

15. To prove that A. and B. took a

distress, a witness was called, who stated that he saw two persons (whom he did not then know) take the distress, and that he had since learnt that their names were A. and B., and that he had seen A. in Court. Another witness who knew A., proved that A. had been in Court:—*Held*, that this was evidence to go to the jury as to A., but not as to B., and that as to B. the evidence was not sufficient. *Bye v. Bower*, 262

16. An allegation in an indictment for perjury, that judgment was "entered up" in an action, is proved by the production of the book from the Judgment-office in which the incipitur is entered. *Reg. v. Gordon*, 410

17. A defendant gave in evidence a letter of the plaintiff dated the 17th of January, which purported to be an answer to a letter written to the plaintiff by Mr. W. The plaintiff's counsel proved Mr. W.'s handwriting to a letter addressed to the plaintiff, and dated the 16th of February, but which had no post-mark, and wished to give this letter in evidence as being the letter to which that of the 17th was an answer:—*Held*, that the letter of the 16th was not receivable in evidence, unless it were shewn that it was the letter to which the plaintiff's letter was an answer, or, at least, that it was in existence before the date of the plaintiff's letter. *M'Namara v. Gibbs*, 412

18. The carriage of P. was driven against the carriage of M., whereby M.'s thigh was broken. On the trial of an action of trespass by M. against P. for this, S., a surgeon, was called as a witness for M., who recovered £600 damages against P. S. afterwards brought an action against M. for his services as a surgeon in attending M. after his thigh was broken. The counsel of S. proposed to go into evidence to shew what S. stated as to the amount of his charge for attendance on M. on giving his evidence on

the trial of the action by M. against P.:—*Held*, that such evidence was not admissible. *Sutherland v. M'Laughlin*, 429

19. Where a defendant has paid a sum into court, and has pleaded that the plaintiff has sustained no greater damages, the plaintiff may give in evidence a judge's summons taken out by the defendant two days before the trial, to allow him to pay a larger sum into court, although that summons was abandoned and no order made upon it. *Domett v. Young*, 465

20. If in an action for slander, in which the declaration contained prefatory allegations, the defendant only plead not guilty, the plaintiff will not be allowed to go into any evidence as to the prefatory allegations; all those allegations must be taken to be perfectly true, as the defendant has not denied them, which he might have done, if he had meant to put the plaintiff to prove them. *Gwynne v. Sharpe*, 532

21. A person who made a distress received a paper from the person by whose authority he distrained, and made a copy of it which he gave to the person distrained on; the original was lost:—*Held*, that parol evidence might be given of its contents without producing or accounting for the copy given to the party distrained on. *Doe d. Morse v. Williams*, 615

22. A mother and son were in possession of a house; a declaration in ejectment was served on the son, who let judgment go by default, and also on the mother, who defended:—*Held*, that on the trial of the ejectment against the mother, an examined copy of a judgment recovered against the son, by the lessor of the plaintiff, for use and occupation of the house, was not receivable in evidence. *Ibid.*

23. A witness in a case of felony may be asked, in cross-examination, whether he was not sworn to a cer-

tain fact before the grand jury. *Reg. v. Gibson*, 672

EVIDENCE IN REPLY.

1. In ejectment to recover garden ground, it was proved for the plaintiff, that the defendant had been let into possession of the garden by M., who had paid rent to the lessor of the plaintiff. The defendant's case was, that M. had rented a part of his garden of the lessor of the plaintiff, and that that had been given up, and that the defendant had the residue of the garden, which was now in dispute, devised to him by his father's will in the year 1791. The lessor of the plaintiff proposed to give evidence in reply, to shew that, from the year 1794, the lessor of the plaintiff and his father received rent for the piece of ground in question:—*Held*, that the evidence was receivable. *Doe d. Sturt v. Mobbs*, 1

2. The prisoner made his defence before the committing magistrate, and on his trial he called witnesses to prove a defence wholly repugnant to his former statement. That former statement had not been given in evidence in the case for the prosecution, and therefore the Court would not allow it to be read, afterwards, to contradict the defence set up by evidence on trial. *Reg. v. Powell*, 500

3. On the trial of an action of debt for the treble value of predial tithe, in which the defendant had pleaded nil debet "by statute," the plaintiff had proved the defendant's occupation of the land, the subtraction of the tithe, its single value, and that tithe had been previously paid in respect of land encroached from the same common. The defendant called witnesses to prove exemption from tithe by reason of barrenness:—*Held*, that, although on the examination of a witness for the plaintiff, a question had been asked as to the fertility of the land, yet the plaintiff was entitled

to call evidence in reply to disprove the defence. *Greswolde v. Kemp*, 635

EXECUTION.

In the Exchequer, if a cause be tried at the third sitting in term, and there be not four days remaining in the term after the return day of the distringas, the plaintiff ought to apply for speedy execution, in order that he may not be delayed till the next term. *Chapman v. Brown*, 463

EXECUTOR.

See APPOINTMENT.—WITNESS, 4.

1. In an action against an executor, on plene administravit pleaded, the plaintiff is bound to shew affirmatively, that the defendant had goods of the testator in his hands unadministered; and though the plaintiff is entitled to his verdict, (and therefore to costs), if he can prove any property unadministered, yet the measure of plaintiff's damages is not the amount of his debt, but so much as he can shew to remain in the hands of the executor. *Jackson v. Bowley*, 97

2. Where the testator assigned his property, and the plaintiff, in an action against the executor, set up fraud in the assignment, and suggested, to prove the fraud, that the testator was insolvent at the time of the assignment, it is sufficient for the purposes of the plaintiff in the action, if, by the very act of assignment, the plaintiff make himself insolvent—that is, if the property left after the conveyance be not enough to pay his debts. But where the sum realized after the death of the testator very nearly equalled the amount of his debts, his Lordship still left it to the jury to say whether there had been fraud in the assignment. *Ibid.*

3. It is a question for the jury, whether the executor has committed a devastavit, by swearing the property

above its value, and so incurring a greater stamp-duty than he would otherwise have to pay, seeing that the executor is bound to act promptly, and therefore is not to be held to too close a search for the testator's property. *Ibid.*

4. A person who is sued as an executor, and who pleads plene administravit, only admits thereby that he is executor de son tort; and an executor de son tort is not liable to the amount of all the property of the testator that would pass by a will, but only for the amount of assets that come to his hands. *Yardley v. Arnold*, 434

5. A. was sued as executor of his father, and pleaded plene administravit. It appeared that the father left no will, and was the owner of a leasehold house, and that A., after his father's death, had received some small sums which had been due to his father, and had paid the expenses of his father's funeral:—*Held*, that A. was not liable for the value of the leasehold house, and was only liable to the extent of the sums he had actually received, against which he had a right to deduct reasonable funeral expenses. *Ibid.*

6. The usual allowance for funeral expenses, to be paid from an insolvent estate, is £20. *Ibid.*

7. A., being sued as executor de son tort of his father, claimed certain goods under a deed of assignment from his father to himself, the consideration whereof was stated in the deed to be a debt due from his father to him; and to prove that the deed was not fraudulent, it was proposed by A.'s counsel to go into evidence to shew that A.'s father really owed A. money:—*Held*, that, for this purpose, what A.'s father said to A., or in A.'s presence, as to his owing A. money, was receivable in evidence, as it was proof of an account stated between them; but that what A.'s father

said on the subject, in the absence of A., was not receivable in evidence, as that would be merely an admission by A.'s father, under whom A. claimed, but under whom the plaintiff did not claim. *Ibid.*

FALSE ANSWER.

See VOTER.

FALSE IMPRISONMENT.

1. A. had communicated to B. & Co., who were distillers, a method of rectifying spirits, and they were to pay him an annuity, and 6*d.* a gallon on all spirits rectified by his method, and to keep an account. A. having a sum due to him, B. & Co. offered to pay it at their solicitor's office, and to produce the account there. A. sent B. & Co. a letter, stating that he should come to the distillery for a sight of the account, and for payment; to which G., one of the firm of B. & Co., replied by letter, stating, that if A. came to the distillery and either rang or knocked, he would be punished, &c. A. went to the distillery (which was within the Metropolitan Police district), and gently rang the gate bell, when H., who was the cashier of the firm, gave A. into the custody of a policeman on a charge of having rung the bell, contrary to the 54th section of the Police Act, 2 & 3 Vict. c. 47:—*Held*, in an action for false imprisonment by A. against G. and H., that this was not a case within that act, and that G. and H. were not justified under that act, and that they were not entitled to notice of action. *Home v. Grimble*, 17

2. On the trial of an action for assault and false imprisonment on a charge of felony, if the plaintiff's counsel ask his witness what was said by the defendant when the parties were before the magistrate, the defendant's counsel may ask, on cross-

examination, what was said by the magistrate. *Richards v. Turner*, 414

3. Where a plea of justification in such a case states, that the plaintiff committed the felony, the jury must try that question in the same way as if they were sitting in a criminal court trying the plaintiff for the offence itself; and if a witness, who admits that he stole similar property at the same time, be called to sustain the plea, though he is not exactly in the situation of an accomplice, yet it seems that his testimony ought to receive some confirmation. *Ibid.*

4. After a summons issued, information was given before the magistrate that the party against whom the summons had been granted was going out of the magistrate's jurisdiction, who thereupon issued his warrant, and the person was taken into custody and afterwards brought his action against the magistrate for false imprisonment. At the trial the summons was given in evidence, and the warrant, but not the information:—*Held*, that the evidence was not sufficient, and that the magistrate must put in the information to justify his warrant for apprehension, for that, without a proper information, the magistrate is liable in an action for false imprisonment, if the party be taken. *Stephens v. Clark*, 509

5. Trespass was brought against three defendants for an assault committed in Bristol. Two of them were constables of Oxford, and had come down and taken the plaintiff at Bristol (thus committing the assault) on suspicion of his having stolen a horse belonging to the other defendant in Oxfordshire. The declaration set out all the trespasses to have been done *without reasonable or probable cause*. The two constables pleaded not guilty only:—*Held*, that they might give the special matter in evidence in *mitigation* of damages, to shew that there was reasonable and probable cause;

but, *semble*, having acted out of their jurisdiction, they were not entitled as *constables* under 21 Jac. 1, c. 12, s. 5, to give the special matter in evidence under the general issue as a *defence* of the trespasses. *Rowlcliffe v. Murray*, 513

FALSE PRETENCES.

See AUTREFOIS ACQUIT.

1. *Semble*, that obtaining money by the false representation of any existing fact, the party making the representation then knowing it to be false, is an obtaining money by false pretences within the stat. 7 & 8 Geo. 4, c. 29, s. 53. *Reg. v. Henderson*, 328

2. An indictment for false pretences against H. and B. charged that F. P. was possessed of a mare, and H. of a horse, and that H. and B. falsely pretended to F. P. that B. "was then and there possessed of a certain sum of money, to wit, the sum of 12*l*." and that if F. P. would exchange his mare for H.'s horse, B. was willing and ready to purchase the horse of F. P. and give him 12*l*. for it; "whereas in truth and in fact the said J. B. was not then and there possessed of the said sum of 12*l*," and was not then and there ready and willing to purchase the said horse:—*Held*, that the indictment was bad, as it did not aver that the defendants *knew* that B. was not possessed of 12*l*. *Ibid*.

3. The prisoner paid his addresses to the prosecutrix, and obtained a promise of marriage from her, which promise she afterwards refused to ratify. He then threatened her with an action, and by this means obtained money from her. During the whole of the transactions the prisoner had a wife. On an indictment against him for obtaining money under false pretences, the pretences laid were, first, that he was unmarried; secondly, that he was entitled to bring and maintain his

action against her for a breach of promise of marriage:—*Held*, that the fact of the prisoner paying his addresses was sufficient evidence for the jury on which they might find the first pretence, that the prisoner was a single man and in a condition to marry; and that there was sufficient evidence on which to find the falseness of the other pretence, that he was entitled to maintain his action for breach of promise of marriage, and that such latter false pretence was a sufficient false pretence within the statute. *Reg. v. Copeland*, 516

4. Form of indictment. *Ibid*.

5. A defendant was charged in the first count of an indictment with having falsely pretended that he was Mr. H., who had cured Mrs. C. at the Oxford Infirmary, and thereby obtaining one sovereign, with intent to defraud G. P. "of the same." The second count laid the intent to be to defraud G. P. "of the sum of 5*s*., parcel of the value of the said last-mentioned piece of the current gold coin." It was proved, that the defendant made the pretence and thereby induced the prosecutor to buy, at the price of 5*s*., a bottle containing something which he said would cure the eye of the prosecutor's child. The prosecutor gave him a sovereign and received 15*s*. in change. It was further proved that the defendant was not Mr. H.:—*Held*, that this was a false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53, and that the intent was properly laid in the second count. *Reg. v. Bloomfield*, 537

FILIIATION (ORDER OF).

See GUARDIAN OF THE POOR.

FORGERY.

1. A customer in the country had an account open with a wholesale

house in London: a letter purporting to come from him was delivered at their place of business; it was in the following form:—"I shall feel obliged by your paying Mr. B. the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same. You will please have a receipt, and add the amount to invoice of order on hand." It appeared to be the practice of the house in London to pay to country customers on requests of a similar description. The party who sent it by an innocent agent, and obtained the money on it, was indicted for forging and uttering it. The instrument was described in the indictment as an *undertaking*—a *warrant*—and an *order*, each for the payment of 2*l.* 7*s.* 8*d.* The prisoner having been convicted of uttering, the fifteen judges *held* the conviction wrong, being of opinion that the instrument was neither an undertaking, a warrant, nor an order. *Reg. v. Thorn*, 206

2. On an indictment for forging and uttering a "warrant and order for the payment of money, to wit, a warrant and order for the payment of £85," and for forging and uttering an "acquittance and receipt for money, to wit, for £85;" it was proved, that J. M. had paid £85 into the D. bank, and had taken an accountable receipt for that amount; and that the course of dealing at the D. bank was to treat the accountable receipt with the depositor's signature on the face of it as an order for the payment of the money deposited and interest; and that the prisoner went to the D. bank with the receipt that had been given to J. M., and having written the name of J. M. on the face of it he delivered it to the bankers, who paid him £85, and also 2*l.* 17*s.* 6*d.* for interest. The prisoner was convicted, and the fifteen judges *held* the conviction right. *Reg. v. Atkinson*, 325

3. H. employed J. L. to do work for him. J. L. had a partner named S., who took no active part in the

business, of which H. was aware. J. L. asked for payment for the work, and H. paid him by a forged bill of exchange, knowing it to be so. J. L. indorsed the bill in his own name only, and gave it to his partner S., who afterwards indorsed it with his own name, and paid it away. H. was convicted of the uttering on a count which laid an intent to defraud J. L., and the judges *held* the conviction right. *Reg. v. Hanson*, 334

4. If the course of dealing between A. & B. is that A. shall write persons names in a list, with a sum against each name, on sight of which B. is to furnish goods on the credit of A. to each person whose name is on the list, to the amount set against his name; such list is a request for the delivery of goods, and the fraudulent alteration of one of the sums in it is indictable as a forgery under the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. *Reg. v. Walters*, 588

5. D. was in the habit of buying bones for F., and of drawing on F. for the price before he delivered the bones. The prisoner forged D.'s name to a letter to F. asking for £3, and stating that D. had bought a large quantity of bones. F. did not at this time owe any money to D.:—*Held*, that this was not an order for the payment of money within the stat. 11 Geo. 4 & 1 Will. 4, c. 66. *Reg. v. Roberts*, 652

FRAUD.

See MONEY HAD AND RECEIVED.

FRAUDS, STATUTE OF

See AGREEMENT.

FRIENDLY SOCIETY.

See LARCENY, 7.

GOODS BADLY MADE.

If A. employ B. to make bricks for him at a stipulated price per thousand,

and B. do so, and some of the bricks be so badly made as to be *good for nothing*, A. will be entitled to make a deduction for these badly made bricks out of the stipulated price, and may make such deduction in an action brought by B. for the stipulated price; but if the bricks be badly made in a trifling degree only, so as merely to be *less valuable* than they otherwise would have been, A., in an action for the stipulated price, will not be entitled to make any deduction on this account. *Pardow v. Webb*, 531

GRAND JURY.

See WITNESS IMPROPERLY SWORN TO GO BEFORE THE GRAND JURY.

GUARDIAN OF THE POOR.

1. A magistrate residing within a poor-law union is only a guardian *ex officio* under the Poor Law Amendment Act, while he is acting as such guardian. *Reg. v. Cant*, 521

2. Two magistrates made an order of filiation under the stat. 2 & 3 Vict. c. 85, upon the complaint of the guardians of the T. union. Both the magistrates resided within the T. union, and were, therefore, guardians *ex officio* of it; and one of them was a rated inhabitant of a township within the T. union, but not that in favour of which the order was made; one of the magistrates had, on other occasions, acted as a guardian *ex officio*; but neither had acted as a guardian in anything respecting this matter: — *Held*, that the order was good, *Ibid*.

HIGH TREASON.

See L. C. J. TINDAL'S CHARGE, p. 661.—POSTPONING TRIAL, 3.

HIGHWAY.

See EVIDENCE, 9, 10, 11.

In an indictment for a nuisance, in obstructing a highway "leading from

the township of D. unto the town of C.," by placing a gate across it, the termini D. and C. are excluded; and therefore, if it appear that the gate was put up in the township of D., the defendant must be acquitted. *Reg. v. Botfield*, 151

HOTEL KEEPER.

See BANKRUPT, 1.

HOUSEBREAKING.

See BURGLARY, 1.—INDICTMENT, 1, 6.

HOUSE OF COMMONS (OFFICERS OF).

See TRESPASS, 6.

HOUSES (DEMOLISHING).

See DEMOLISHING HOUSES.

HUSBAND AND WIFE.

See CRIM. CON.—LARCENY, 1, 2, 3, 4.

IGNORED BILL.

See INDICTMENT, 9.

INDICTMENT.

See ACCESSORY, 3.—ASSAULT WITH INTENT TO ROB. — EMBEZZLEMENT, 4, 5. — FALSE PRETENCES, 2, 5. — HIGHWAY. — MANSLAUGHTER. — MURDER, 6, 7, 9.—PERJURY, 12, 13, 14, 15, 16.—ROBBERY. — WITNESS IMPROPERLY SWORN TO GO BEFORE THE GRAND JURY.

1. An indictment for housebreaking, after charging the breaking and entering in the usual form, charged that the prisoner "forty-two pieces of the current gold coin of this realm, called sovereigns, of the value of £42, in the same dwelling-house then and there being found, *then and there feloniously did steal and carry away*," &c.: — *Held*, good, and that the

words "then and there," in the last allegation, were sufficient without the words "in the same dwelling-house" being added to them. *Reg. v. Andrews*, 121

2. In an indictment for receiving stolen tin, "ingots of tin" are properly described as so many pounds weight of tin; so, it would be proper to describe a bar of iron as so many pounds weight of iron; but if an article has obtained, in common parlance, a particular name of its own, it would be wrong to describe it by the name of the material of which it is composed; thus, it would be a misdescription to describe cloth as so many pounds weight of wool, or sovereigns as so many ounces of gold. *Reg. v. Mansfield*, 140

3. An indictment charged a prisoner with having burglariously broken and entered a dwelling-house "with intent one A. D., in the said dwelling-house there being, violently and against her will *then and there* feloniously to ravish and carnally know." Whether that allegation is sufficient without the addition of the words, "in the said dwelling-house," after the words "then and there"—*quære*. *Reg. v. Watkins*, 264

4. Where a statute declares an offence and awards a punishment, and by a subsequent act the punishment is altered, the indictment for such offence should conclude "against the form of the statutes." *Regina v. Adams*, 299

5. An indictment for a conspiracy charged the defendant with conspiring with other persons unknown "to cheat and defraud J. D. *and others*;" and laid as overt acts that the defendant did falsely pretend to J. D. that he was a merchant named G., and did under colour of a pretended contract with J. D., for the purchase of certain goods "of the said J. D. *and others*," obtain a large quantity of the goods "of the said J. D. *and*

others," with intent to defraud "the said J. D. *and others*:"—*Held*, that the words "and others" throughout this indictment must be taken to mean *others the partners of J. D.*, and not persons wholly unconnected with J. D.; and that, on the trial of this indictment, evidence was not admissible to shew that the defendant attempted to defraud other persons wholly unconnected with J. D. *Reg. v. Steel*, 337

6. In an indictment for burglary it is sufficient to allege that the burglary was committed at a place, naming it, e. g. "at Norton-juxta-Kempsey, in the county aforesaid," without stating the place to be a parish, vill, chapelry, or the like. *Reg. v. Brookes*, 544

7. An indictment for breaking into a warehouse and stealing goods stated the offence to have been committed in "the parish of St. Peter the Great, in the county of W." It appeared that only part of the parish of St. Peter the Great was in the county of W.:—*Held*, that the indictment could not be supported for the breaking into the warehouse, but that it was sufficient for the larceny; and that to be good as to the breaking it should have charged the offence to have been committed "in that part of the parish of St. Peter the Great which lies within the county of W." 543

8. A defendant in an indictment cannot *after plea* take advantage of any defect which is aided *after verdict* by the 21st sect. of the stat. 7 Geo. 4, c. 64, the only mode of taking advantage of such defects being by demurrer. *Reg. v. Ellis*, 564

9. If the grand jury at the assizes or sessions have ignored a bill, they cannot find another bill against the same person for the same offence, at the same assizes or sessions; and if such other bill be sent before them they should take no notice of it. *Reg. v. Humphreys*, 601

INSOLVENT DEBTOR.

INDICTMENT (FORMS OF).

1. Indictment for neglecting and abandoning a new-born child. 164
2. For refusing to aid a constable. 314
3. For obtaining money by false pretence of being a single person, and threatening an action for breach of promise of marriage. 517

INFANT.

On a replication to a plea of infancy that the articles supplied were necessities, the question is not only whether the articles were of a kind that would be necessary to a person in the station of the defendant, but also whether the defendant had a sufficient supply of those articles at the time of the sale by the plaintiff, for, if he had, the goods supplied by the plaintiff were not necessities, and the plaintiff cannot recover for them; and if a party supply goods to one under age, without ascertaining whether such person be already fully supplied with such articles, he does so at the risk of their being proved to be not necessary at the time of the supply, by reason of the person being already fully supplied with such articles, and of thereby failing in an action for the recovery of their price. *Steedman v. Rose*, 422

INSOLVENT DEBTOR.

See ESCAPE.

An insolvent debtor wilfully and fraudulently omitting sums of money from his special balance sheet is not guilty of a misdemeanor under the 99th section of the stat. 1 & 2 Vict. c. 110, as that enactment only applies to cases where the omission would affect the interests of creditors, and not where there is an omission of money received and subsequently expended by the insolvent. *Reg. v. Marner*, 628

ISSUE FROM CHANCERY. 699

INSURANCE.

See BEGIN (RIGHT TO), 2.—
JUROR, 2.

1. In an action to recover the amount of a policy upon a life insurance, where the rules of the society stipulate that the insured shall be of sober and temperate habits, it is sufficient, upon a plea denying the sober and temperate habits of the insured, for the defendants to shew that his habits were intemperate; and it is no answer to this plea, that the plaintiff prove the intemperance not to have been to such a degree as to injure the health of the insured, or to shorten his life. *Southcombe v. Merriman*, 286

2. A ship which was insured ran aground and was much damaged. She was surveyed, and, in consequence of the report of the surveyors, sold as she lay:—*Held*, that, to entitle the assured to recover as for a total loss, they must satisfy the jury, that, as prudent men, and exercising a sound discretion, they would, if they had been uninsured, have sold the vessel as they did; and that the jury must be satisfied not only that the assured, if uninsured, would have acted as they did, but that they would have done prudently in so acting. *Domett v. Young*, 465

INTENDED APPRENTICE.

See BOARD AND LODGING.

INTENT.

See FORGERY, 3.—WOUNDING, 1.

INTEREST.

See BILL OF EXCHANGE, 5.—VENDOR AND PURCHASER, 4.

INTERPLEADER.

See PERJURY, 4.

ISSUE FROM THE COURT OF CHANCERY.

1. If an issue be directed by the

Court of Chancery to be tried by a special jury, and a full special jury do not attend, whether either party is entitled to pray a tales, without the consent of the other party?—*quare*. *Wood v. Thompson*, 171

2. On the trial of an issue directed by a court of equity, the judge will take notice of the terms of the order by which the issue is directed. *Ibid*.

3. Issues of *devisavit vel non* were directed by the Master of the Rolls, who ordered that they should be tried by a special jury, but that none of the special jury should reside within twelve miles of G. (the assize town). There was no order as to the talesmen, and only eight special jurors appeared. The plaintiff's counsel prayed a tales; but the other party objected. The judge would not grant a tales, on the ground that, there being no order of the Master of the Rolls as to the talesmen, and their residing within twelve miles of G. being no legal ground of challenge, the talesmen could not be asked, on the *voir dire*, as to their residences; and that, if any of them did reside within twelve miles of G., the Master of the Rolls would probably order a new trial on that ground. The trial, therefore, stood over till the next assizes. *Ibid*.

JOINT-STOCK BANK.

See EMBEZZLEMENT, 3.

JUDGE'S SUMMONS.

See EVIDENCE, 19.

JUROR.

See WITNESS, 8.

1. The exemption from serving as jurymen, claimed by the members of the Barbers' Company under the charters of 1 Edw. 4, and 5 Car. 1, and the stat. 18 Geo. 2, c. 15, does not extend to the Central Criminal Court, but is confined to the local courts of the city, viz. those holden

LANDLORD AND TENANT.

before the mayor, the sheriffs, or the coroner. *In re White*, 189

2. If during the trial of a case of felony it be discovered that the prisoner has a relation on the jury, this is no ground for discharging the jury, and the trial must proceed. *Reg. v. Wardle*, 647

JURORS (CHALLENGE OF).

See ISSUE FROM THE COURT OF CHANCERY, 3.

In an action against an insurance office on a life policy, it is no objection to a special juror being sworn, that he is a director of another insurance office, unless that office has granted a policy on the life in question, and the amount of that policy be unpaid. *Craig v. Fenn*, 43

JUSTICE OF THE PEACE.

See FALSE IMPRISONMENT, 4.—GUARDIAN OF THE POOR.—SLANDER, 3, 4.

LANDLORD AND TENANT.

See EVIDENCE, 1, 8, 21.—TRESPASS, 7.

1. Where a landlord, during the existence of a tenancy, charged his tenant, under the 2 & 3 Vict. c. 71, s. 38, (the Police Court Act), with having three months before wilfully damaged his premises:—*Held*, that the magistrate had no jurisdiction, and that the charge should have been made within one month. *Dowell v. Beningsfield*, 9

2. In an action by a tenant against his landlord for a malicious charge of felony, under the stat. 7 & 8 Geo. 4, c. 29, s. 45, for stealing fixtures let to him, it is not necessary to give a notice of action under the 75th section of the stat. 7 & 8 Geo. 4, c. 29, (the Larceny Consolidation Act). *Ibid*.

3. Where, in an action by a land-

lord against his tenant for use and occupation, the tenant offers in evidence a document shewing that the landlord's title has ceased, the document is admissible, because the property has passed to another who has a right to sue him for the same use and occupation. But when it appears, that, under the document in question, the property would have passed from the plaintiff before the time of the use and occupation for which he sued, the document is not admissible, on the ground that a tenant cannot deny his landlord's title. *Agar v. Young*, 78

4. A tenant may not deny his landlord's title, because, if that title be bad, the tenant's first duty is to give up the possession which he received from the landlord, and not to defend an action. *Ibid.*

5. A lease from the Board of Ordinance, which purported to be signed, sealed, and delivered, being first duly stamped, was not stamped; and the Court held, that, being a lease from the Crown, it was not necessary that it should be. *Petrie v. Lamont*, 93

6. Four trustees were joint landlords of a house under a deed of trust; and notice to quit was served upon the tenant, but signed by three of them only:—*Held*, that the notice was sufficient to put an end to the connection between all the parties as landlord and tenant. *Alford v. Vickery*, 280

7. Notice to quit was given, and it expired at Lady-day, 1840: the tenant held on till Lady-day, 1841, but since the former period there had been no payment of rent, nor any other act done to shew that a new tenancy was created. The landlord distrained for rent due at Lady-day, 1841:—*Held*, that the distress was not justifiable. The landlord ought to have sued for use and occupation. *Ibid.*

8. A notice to quit is sufficiently served upon a tenant, if it can be

shewn that it came to his hands before the six months previous to the expiration of his year of holding, though the notice had been served only by having been put under the door of the tenant's house. *Ibid.*

9. If premises be let for the purposes of occupation, it is an implied condition that they should be fit for occupation. *Smith v. Marrable*, 479

10. If A. take a furnished house of B. for five weeks, and it be so infested with bugs as to be unfit for the occupation of a respectable family, this will justify A. in quitting it; and when in such a case the tenant quitted at the end of four days, paying a week's rent, it was held that he was justified in what he did, and was not liable for any subsequent rent. *Ibid.*

11. *Held*, also, that in an action for use and occupation for the four weeks' rent (in which credit was given in the particulars for the rent actually paid), non assumpsit was the proper plea. *Ibid.*

12. Where a tenancy is continued beyond the time for which it was originally taken, and nothing is arranged respecting the amount to be paid on the new holding, that new holding is not of necessity to be on the same terms as the former; but the jury may give the landlord a larger sum for the continued occupation, if there be circumstances to shew that such increased rent was expected by him in the event of holding over, and that that understanding was not repudiated by the tenant. *Elgar v. Watson*, 494

LARCENY.

See ACCESSORY, 4. — AUTREFOIS ACQUIT. — BURGLARY, 1. — EVIDENCE, 7. — INDICTMENT, 2, 7. — POST-OFFICE (OFFENCES BY SERVANTS OF THE), 2, 3.

1. There is such a unity of interest between husband and wife that ordi-

narily the wife cannot steal the goods of the husband, nor can an indifferent person steal the goods of the husband by the delivery of the wife; and if the wife deliver the goods of the husband to an indifferent person, for that person to convert them to his own use, this is no larceny; but if the person to whom the goods are delivered by the wife be an adulterer it is otherwise, and an adulterer can be properly convicted of stealing the husband's goods though they be delivered to him by the wife. *Reg. v. Tollett*, 112

2. If no adultery has actually been committed by the parties, but the goods of the husband are removed from his house by the wife and the intended adulterer, with an intent that the wife should elope with him and live in adultery with him, this taking of the goods is, in point of law, a larceny. *Ibid.*

3. If a wife elope with an adulterer, who takes her clothes with them, the taking is a larceny; and it is as much a larceny to steal her clothes, which are her husband's property, as it would be to steal anything else that is his property. *Ibid.*

4. If, on the trial of a man for larceny, the jury are satisfied that he took any of the prosecutor's goods, there then being a criminal intention, or there having been a criminal act between the prisoner and the prosecutor's wife, the jury ought to convict, even though the goods were delivered to the prisoner by the prosecutor's wife; but if the jury should think that the prisoner took away the goods merely to get the wife away from her husband as a friend only, and without any reference to any connection between the prisoner and the wife, either actual or intended, they ought to acquit. *Ibid.*

5. A person was indicted for stealing four warrants and orders for the payment of money. In one count they were called "warrants and orders

for the payment of money," merely, in another, "warrants and orders for the payment of money, commonly called post-office money orders;" and in a third count, they were described as "four valuable securities, that is to say, four warrants and orders for the payment of money, commonly called post-office money orders." They purported to be signed by the postmaster of Shrewsbury, and were addressed "*To the Post-Office, London.*" The form of the body of them was, "Credit the person named in my letter of advice the sum of £5, and debit the same to this office:"—*Held*, that the instruments were both warrants and orders for the payment of money: and also, that it was not necessary to consider, whether they were in such a form as to require a stamp under the general Stamp Act; because it was the practice of the post-office to issue them unstamped, and that practice was sanctioned and legalized by the statute 3 & 4 Vict. c. 96. *Reg. v. Gilchrist*, 224

6. Although a person finding property, the ownership of which has not been abandoned, may not convert it to his own use, at any rate not without some endeavour to discover the owner, and although ignorance of the law will excuse none, yet, where an ignorant person found a five-pound note and appropriated it, the Court directed the jury to consider the state of the finder's mind; and ruled, that if the jury thought the person really believed the note to be her own by right of finding, the jury should not bring in a verdict of guilty on the indictment for a larceny of the note. *Reg. v. Reed and Wife*, 306

7. If a benefit society, enrolled under the stat. 10 Geo. 4, c. 56, as amended by the stat. 4 & 5 Will. 4, c. 40, have a treasurer and two trustees, the property of the society may in an indictment for larceny be laid to be in the treasurer by his proper

name, under sect. 21 of the stat. 10 Geo. 4, c. 56, which provides that the property of such societies "for all purposes of action or suit, as well civil as criminal," should be deemed and taken to be, and, in every such proceeding where necessary, stated to be the property of the "treasurer or trustee of such society for the time being in his or her proper name, without further description;" and upon an indictment so framed one of the trustees of the society, who has stolen the money of the society, may be properly convicted of larceny. *Reg. v. Cain*, 309

8. A knife was stolen from the pocket of A., as his dead body lay in the road at S., in the diocese of W. The last place of abode of A. was at T., in the diocese of G., but A.'s father stated that he believed his son had left T. to come to live with him, but did not know whether his son had given up his lodgings at T.:—*Held*, that this was sufficient proof to support a count for larceny, laying the property in the Lord Bishop of W. *Reg. v. Tippin*. 545

9. A servant clandestinely taking his master's corn, to give to his master's horses, is guilty of a larceny, and this point having been so recently decided by a large majority of the 12 judges, the judge at the trial would not again reserve the point. *Reg. v. Handley*, 547

10. A. employed B. to take his barge from S. to E., and paid him his wages in advance, and gave him a separate sum of three sovereigns to pay the tonnage dues. B. took the barge 16 miles, and paid tonnage dues to the amount rather under £2, and appropriated the remaining sovereign to his own use:—*Held*, a larceny. *Reg. v. Goode*, 562

11. If a father buy cloth which is made into trousers for his son, who is seventeen years of age, these trousers may, in an indictment for lar-

ceny, be laid as the property of the father. In such cases the property may be laid either in the father or the son, but the better course is to lay it in the latter. *Reg. v. Hughes*, 593

12. A servant was sent with 6s. to buy twelve cwt. of coals, he bought a smaller quantity for which he paid 3s. 3d., and appropriated one of the shillings to his own use:—*Held*, a larceny. *Reg. v. Beaman*, 595

13. Where a person stole two pigs belonging to the same person, at the same time, and after being convicted and punished for stealing the one, was again indicted at a subsequent assize for stealing the other:—*Held*, that this might legally be done; but *semble* that in such a case the second prosecution ought not to be proceeded with. *Reg. v. Brettell*, 609

14. The prisoner, who was not otherwise in the prosecutor's service, was employed by him to drive six pigs from C. to U.; on the way he left one at Mr. M.'s, stating that it was lame, and he told the prosecutor that he had done so. The prosecutor desired the prisoner to go and ask Mr. M. to keep the pig for him till the following Saturday; the prisoner went to Mr. M.'s and sold the pig:—*Held*, no larceny. *Reg. v. C. Jones*, 611

15. If a person is allowed to have the possession of a chattel, and he converts it to his own use, it is not larceny, unless he had an intention of stealing it when he obtained the possession of it; but if he has merely the custody of a chattel he is guilty of a larceny if he disposes of it, although he did not intend to do so at the time when he received it into his custody. *Ibid.*

16. A. delivered a waistcoat to the prisoner to take to E. R. to be washed. B. delivered it to E. R. as his own, and E. R., having washed it, returned it to the prisoner, who converted it to his own use. The judge left it to the jury to say whether the prisoner at

the time when he received the waist-coat from A. had an intention of stealing it, for that it was no larceny if at that time he had not an intention of stealing it. *Reg. v. Evans*, 632

LEAVE AND LICENSE.

See ASSAULT, 3.

LETTER CARRIER.

See POST-OFFICE (EMBEZZLEMENT BY SERVANTS OF THE), 1.

LIBEL.

1. In an action for a libel in a newspaper, a certified copy of the Stamp-office declaration was put in, which stated the title of the newspaper to be "The Leicester Herald and Midland Counties Advertiser," and the intended place of publication to be "No. 23, Charles-street, in the parish of Saint Margaret, in the borough of Leicester." The newspaper containing the libel had the same title, but the place of publication in the imprint at the end of it was, "at the corner of Charles-street and Hadfield-street, in the parish of Saint Margaret, in the borough of Leicester:"—*Held*, that this sufficiently shewed the identity of the newspaper, so as to allow it to be given in evidence under the 8th sect. of the stat. 6 & 7 Will. 4, c. 76. *Baker v. Wilkinson*, 399

2. A. (the plaintiff) obtained a rule nisi for a criminal information against B. (the defendant) for sending him a challenge, and A.'s affidavits contained matters of high censure against B. The affidavit of B., in shewing cause against this rule, was recriminatory, and would, under other circumstances, have been libellous. In an action by A. against B. for the libel contained in B.'s affidavit, it was

MALICIOUS PROSECUTION.

held, that B. was justified in setting forth any such matters respecting A.'s past conduct as he might think would disincline the court to entertain the application for A.'s rule. *Doyle v. O'Doherty*, 418

LIEN.

See DETINUE.—WITNESS, 3.

LIFE INSURANCE.

See INSURANCE, 1.

LIMITATION.

See EJECTMENT, 2, 3.—*LANDLORD AND TENANT*, 1.

LODGING-HOUSE KEEPERS.

See BANKRUPT, 1.

MAGISTRATE.

See FALSE IMPRISONMENT, 4.—*GUARDIAN OF THE POOR.—SLANDER*, 3, 4.

MALICIOUSLY SUING OUT A FIAT IN BANKRUPTCY.

The declaration, in an action for maliciously suing out a fiat in bankruptcy, contained an allegation that it was ordered by the Court of Review, "that the said fiat should be annulled, and the same was accordingly thereby then annulled, and the proceedings on the said fiat were thereupon ended and determined." The order of the Court of Review was, that the fiat "be annulled, if the Right Hon. the Lord Chancellor shall think fit," and at the foot of it was a confirmation of it signed by the Lord Chancellor:—*Held*, that the allegation was substantially proved. *Kemp v. King*, 396

MALICIOUS PROSECUTION.

Whether an action for a malicious

prosecution can be maintained where the party charged has been illegally convicted by a magistrate who had no jurisdiction to entertain the charge—*quære*. *Dowell v. Beningsfield*, 9

MANSLAUGHTER.

See ASSAULT, 4.—MURDER, 1, 2, 3.

1. An indictment for manslaughter stated that the prisoners gave, administered, and delivered to one M. A. divers large and excessive quantities of spirits and water, wine and porter, and induced, procured, and persuaded him to drink them; the said quantities &c. *being likely to cause death, which they well knew*. It then averred that M. A., by their persuasion &c., drank, &c., and became greatly drunk and distempered &c.; and while he was so, the prisoners assaulted him and forced him to go into, and placed and confined him in a cabriolet, and drove and carried him about in it for two hours, and thereby greatly shook and knocked him about, by means whereof he became mortally sick, &c., and of the said large and excessive quantities &c., and of the said drunkenness &c., occasioned thereby, and of the said shaking &c., and of the sickness and distemper occasioned by it, he instantly died. The deceased was a man in possession under the sheriff; and one of the prisoners, of whose goods he was in possession, assisted by his brother and a friend, plied the man with liquor, themselves drinking freely also, and when he was very drunk put him into a cabriolet and caused him to be driven about the streets; and about two hours after he had been put into the cabriolet he was found dead:—*Held*, that, if it were essential to prove that the prisoners knew that the liquors were likely to cause death, the case would be one of murder and not of manslaughter, but that such allegation was not a material part of

the indictment, but might be dismissed from the jury's consideration:—*Held*, also, that if the prisoners, when the deceased was drunk, put him into a cabriolet and drove him about in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. *Reg. v. Packard*, 236

2. An indictment for manslaughter stated in the first count, that the deceased was the apprentice of the prisoner, and that it was the duty of the prisoner to provide the deceased with proper nourishment, medicine, &c., and charged the death of the deceased to be from neglect, &c. The second charged that the deceased, "so being such *apprentice as aforesaid*," was killed by the prisoner by overwork and beating. No evidence was given of any indenture, but a witness proved that the prisoner told him that the deceased was his apprentice:—*Held*, that this was sufficient proof of the allegation of the apprenticeship in the second count, but not of that in the first count. *Reg. v. Crumpton*, 597

MARRIAGE.

See CRIM. CON., 1.

MASTER AND SERVANT.

See LARCENY, 9, 10, 12, 14.—

SLANDER, 1, 2.

1. The defendant, the captain of one of her Majesty's ships, offered to give the plaintiff wages beyond the usual pay from the government, if he would come on board his ship as captain's cook. The plaintiff agreed accordingly, and was by that designation (captain's cook) entered in the ship's books. The agreement was made before he joined the service, and when he was free to accept the proposal of the captain or to reject it. In an action afterwards brought by

him against the captain for wages, the defendant not having pleaded the illegality of the contract, it was *held*, 1st, that the Court must look upon the contract as legal; and 2ndly, that being made when each party was sui juris, there was no inconsistency in the plaintiff's bargaining to receive the private pay of the defendant for filling an office, in respect of which he was also paid by the government. *Clutterbuck v. Coffin*, 273

2. In assumpsit by the plaintiff for wages as a female servant, the defendant pleaded non assumpsit, and the plaintiff gave evidence of acts of service. The defendant proposed to give evidence to shew that the plaintiff had cohabited with him:—*Held*, that he might do so in the plea of non assumpsit, as this went to shew that there was no contract between the parties, and not to invalidate any contract on the ground of illegality. *Bradshaw v. Hayward*, 591

MISDEMEANOR.

See ATTEMPT TO COMMIT MISDEMEANOR.

MITIGATION OF DAMAGES.

See GOODS BADLY MADE.

MONEY HAD AND RECEIVED.

A. on Tuesday, the 17th of November asked B. to give him change for a cheque for 10*l.* 10*s.*, drawn by C. on W. & Co., bankers. B. did so, and kept the cheque till the following Saturday, when he paid it to his bankers. On Monday the 23rd, W. & Co. stopped payment, and the cheque was not paid by them. On the evening of that day B. told A. that the cheque had been "returned," not telling A. that W. & Co. had stopped payment, a fact which A. did not know. A. gave B. £5, and an I. O. U. for 5*l.* 10*s.*, and took back the cheque.

MURDER.

It was proved that C. had funds in the hands of W. & Co.:—*Held*, that the suppression of the fact by B. that W. & Co. had stopped payment, and the statement by him that the cheque had been "returned," amounted to such a fraud upon A. as would entitle him to recover back the £5, in an action for money had and received; and that, to entitle him to do so, it was not necessary that he should have given or tendered back the cheque to B. *Billing v. Rice*, 26

MORTGAGE.

See POWER.

MURDER.

1. If a person do any act towards another who is helpless, which must necessarily lead to the death of that other, the crime amounts to murder; but if the circumstances are such that the person would not have been aware that the result would be death, that would reduce the crime to manslaughter, provided that the death was occasioned by an unlawful act, but not such an act as shewed a malicious mind. *Reg. v. Walters*, 164

2. If a woman left her child, a young infant, at a gentleman's door, or other place where it was likely to be found and taken care of, and the child died, it would be manslaughter only; but if the child were left in a remote place, where it was not likely to be found—*e. g.* on a barren heath—and the death of the child ensued, it would be murder. *Ibid.*

3. Form of indictment. *Ibid.*

4. A police-officer found N. with potatoes under his shirt, which had been very recently dug from the ground, and apprehended him. The policeman called O. to assist him; O. did so; and a rescue being attempted, O. was going away, and was struck by A., who went away, and O. was afterwards killed by other persons,

who attempted the rescue:—*Held*, that the police-officer had no right to apprehend N., and that the killing of O., therefore, did not amount to murder; and that, on an indictment for murder, A. could not be convicted of an assault. *Reg. v. Phelps*, 180

5. *Held*, also, that a person charged to aid a constable, and who does so, is protected eundo, morando, et redeundo. *Ibid.*

6. A., B., and C. were indicted for murder: in the first count, as principals in the first degree; and in the second count A. was indicted as a principal in the first degree, and B. and C. as principals in the second degree; and the grand jury ignored the first count as to B. and C., and found a true bill, on the second, against all. *Semble*, that B. and C. might be convicted on the second count as principals in the murder, although A. was acquitted. *Ibid.*

7. A count charged A. with murder, and charged that B. and C. "at the time of the felony and murder was committed, to wit, on &c., at &c., were feloniously present, then and there abetting, aiding, and assisting," &c. *Semble*, that the word "was" may be rejected as surplusage; but whether, even rejecting that word, this be a good form of charging aiders and abettors—*quære*. *Ibid.*

8. If a person, being attacked, should from an apprehension of immediate violence, an apprehension which must be well grounded and justified by the circumstances, throw himself for escape into a river, and be drowned, the person attacking him is guilty of murder. *Reg. v. Pitts*, 284

9. An indictment for murder by poisoning, which charges that the prisoner did administer the poison to the deceased, who took and swallowed it, by means of which taking and swallowing the deceased became mortally sick, and "of the said mortal sickness died," is good without also

stating that the deceased died of the poisoning. *Reg. v. Sandys*, 345

10. A prisoner was tried for the murder of her child, E. S., by poison. E. S. died on the 25th of September. On the 14th of October following another child of the prisoner, named M. A. S., died under suspicious circumstances, and the prisoner was examined on oath at the coroner's inquest held on M. A. S., and signed her deposition, in which she made a statement as to the death of E. S. Whether this deposition was receivable in evidence on the trial of the prisoner for the murder of E. S.—*quære*. *Ibid.*

11. If a child has been wholly produced from the body of its mother alive, and she wilfully and of malice aforethought strangle it while it is alive and has an independent circulation of its own, this is murder, although the child be still attached to its mother by the umbilical cord. *Reg. v. Trilloe*, 650

NEGLECT.

1. Case for negligence of defendant's servant, and consequent injury to plaintiff. Plea,—That the defendant was not employed to make the alterations, (those through which the injury occurred), in manner and form:—*Held*, that, though the defendant had been employed by a society (the Clarence Club) to make alterations and improvements in their club-house, and, though he had employed and stipulated with an agent A. B., a gas-fitter, to do such part of the work as lay in his (A. B.'s) department, yet, if A. B. had laid on any pipe not specified in his contract or estimate with the defendant, the defendant was not liable for injury occasioned by the mismanagement or ill manufacture of this particular pipe. *Rapson v. Cubitt*, 64

2. *Held*, also, that if the pipe in

question had been included in A. B.'s contract with the defendant, yet, if, while the defendant's men were working on the premises, and the defendant's contract was not yet finished, and the house was unoccupied, except by the plaintiff, (the servant of the club), the gas had been turned on by *his* direction and not by that of the defendant or his agent, the defendant was not liable. *Ibid.*

3. In such cases as above, although the plaintiff, through the negligence of the defendant, be disabled for life from performing the duties of the office to which he had been accustomed, yet the measure of his damages is by no means to be taken from the amount of an annuity, which would replace the annual salary of the plaintiff. For, non constat that the plaintiff would have retained his situation for life. *Ibid.*

4. The society of a club, through their committee, employed the defendant to make alterations, &c., in their club-house, and by the misconduct of the defendant's agent an accident occurred:—*Quære*, if the society is answerable as principal, and is the defendant free as intermediate agent? *Semble*, the defendant, as relating to the immediate cause of the action, is the principal. *Ibid.*

5. If a cargo weighing a certain weight be delivered to a carrier to be carried, and when the cargo arrives at its destination, the weight be deficient, this is evidence from which a jury may infer negligence in the carrier; and if the deficiency did not arise from the negligence of the carrier, it is incumbent on him to shew that.

Hawkes v. Smith,

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NEW ASSIGNMENT.

See BEGIN (RIGHT TO), 1.

NEWSPAPER.

See LIBEL, 1.

NOTICE OF ACTION.

NOLLE PROSEQUI.

See BILL OF EXCHANGE, 2.

NONSUIT.

See STATUTE.

NOT GUILTY BY STATUTE.

See PLEADING, 2.

NOTICE OF ACTION.

See FALSE IMPRISONMENT, 1.

1. In an action by a tenant against his landlord for a malicious charge of felony, under the stat. 7 & 8 Geo. 4, c. 29, s. 45, for stealing fixtures let to him, it is not necessary to give a notice of action under the 75th section of the stat. 7 & 8 Geo. 4, c. 29, (the Larceny Consolidation Act). *Dowell v. Benningfield,* 9

2. The witness, who served a notice of action, did not know the handwriting of the plaintiff, whose signature the notice purported to bear; and no evidence was given of the plaintiff's handwriting:—*Held* sufficient without such proof, as it was enough that the notice should have been served on the plaintiff's behalf. *Forman v. Dawes,* 127

3. The plaintiff refused to exercise the office of parish officer and make a rate for his district, though he had been appointed churchwarden of a chapelry within the union. Whereupon the defendant, the clerk to the board of guardians, obtained by their direction a warrant of justices to levy the amount claimed off the plaintiff's goods, under 2 & 3 Vict. c. 84, s. 1. Upon trespass brought by the plaintiff for this distress:—*Held*, that this trespass was an act done in pursuance of the provisions of the Poor Law Amendment Act, and that therefore the defendant was entitled to notice of action and to the other protections afforded by 4 & 5 Will. 4, c. 76, s. 104. *Carter v. Filliter,* 498

NOTICE TO QUIT.

NOTICE OF DISHONOUR.

See BILL OF EXCHANGE, 6.

NOTICE TO ADMIT.

See ADMISSION.—COSTS.

NOTICE TO PRODUCE.

1. A notice to produce, served by the defendants on the plaintiffs, giving them notice to produce "all letters written to and received by you between the years 1837 and 1841, both inclusive, by and from the said defendants or either of them, during the time aforesaid, or by or to any person on their or your behalf respectively," is good, and is not too general, although it does not specify the date of each particular letter. *Morris v. Hannen*, 29

2. In a town cause for goods sold, in which the defendant and his attorney both lived in town, a notice to produce a letter from the plaintiff to the defendant, asking payment, was served at the office of the defendant's attorney, at 7 P. M., on the evening of the day before that on which the cause was tried:—*Held*, to be not too late, and the letter not being produced, secondary evidence was given of its contents. *Leaf v. Butt*, 451

3. In a town cause for an assault in which the defendant and his attorney both lived in town, a notice to produce a letter from the plaintiff's attorney to the defendant, asking compensation, was served at the defendant's house and at the office of the defendant's attorney, at about half-past six P. M., on the evening of the day before that on which the cause was tried:—*Held*, to be not too late, and the letter not being produced, secondary evidence was given of its contents. *Meyrick v. Woods*, 452

NOTICE TO QUIT.

See LANDLORD AND TENANT, 6, 7, 8.

ONUS PROBANDI. 709

NUISANCE.

On an indictment for a nuisance, it was proved on the part of the prosecution, that the wharf (the nuisance complained of) was erected over a part of the river, between high and low water mark, where boats were used before to pass. And for the defendant it was shewn that the wharf was a convenience to the public, inasmuch as boats of heavy burden could come to unlade at the wharf, which, before the building of the wharf, anchored in the middle of the river; and that the channel of the river was by this convenience kept clear:—*Held*, that the question for the jury was, whether the wharf occasioned any hindrance to the navigation of the river by vessels of any description, and not whether the erecting of the wharf had caused a benefit to the navigation in general. *Reg. v. Randall*, 496

OATHS (ADMINISTERING UNNECESSARY).

The defendant, a county magistrate, complained to the Bishop of Exeter of the conduct of two of his clergy, and to substantiate his charge he swore witnesses before himself, as magistrate, to the truth of the facts:—*Held*, that the matter before the Bishop was not a judicial proceeding, and therefore that the magistrate had brought himself within the enactment, 5 & 6 Will. 4, c. 62, s. 13, and that he had unlawfully administered voluntary oaths contrary to the provisions of that statute. *Reg. v. Nott*, 288

OFFICERS OF THE HOUSE OF COMMONS.

See TRESPASS, 6.

ONUS PROBANDI.

See NEGLIGENCE, 5.

OPENING A CASE.

See PRACTICE, 7.

ORDER OF MAGISTRATES.

See GUARDIAN OF THE POOR.

OWNER.

See ACCESSORY, 2.

PARTICULARS OF DEMAND.

Where a bill of particulars is for claims of diverse character, if the defendant pays money into court generally, he acknowledges the validity of every species of claim, and it is then for the jury to assess the damages on each. *Elgar v. Watson*, 494

PARTNER.

See ACCESSORY, 2.—BILL OF EXCHANGE, 7, 8, 9.—EMBEZZLEMENT, 3.

The defendant contemplated entering into partnership with the house of B. & S. V. In furtherance of his intention he advanced £2000 to them. They removed their banking account at his recommendation, and changed the name of their firm to "B. & S. V. & Co.;" but no formal deed of partnership had been signed, nor was any entry shewn in the books of B. & S. V. which proved the defendant to be a partner:—*Held*, that it was a question proper to be left to the jury, whether the defendant were liable as a partner for the debt of B. & S. V. & Co. *Gabriel v. Evill*, 358

PART-OWNER.

See ACCESSORY, 2.

PATENT.

1. In an action for the infringement of a patent, the defendant cannot, by his notice of objections (given under the stat. 5 & 6 Will. 4, c. 83,

PEER, INDICTMENT AGAINST.

s. 5), go beyond his pleas. *Macnamara v. Hulse*, 471

2. *Semble*, that if an invention, for which a patent is granted, would, if put into practice, be useful, an action for the infringement of the patent may be maintained, although the plaintiff's invention has never been put into actual use, except by the defendant, when he infringed the patent. *Ibid.*

3. Where in an action for infringing a patent for blocks for pavement, the plaintiff claimed as his invention that his block was bevelled both inwards and outwards on the same side of the block, and it was alleged that the defendant's blocks were an imitation of the plaintiff's, as two of the defendant's blocks were equivalent to one of the plaintiff's:—*Held*, that it was for the jury to say whether the defendant's blocks were in effect the same as the plaintiff's, although no single block of the defendant's was bevelled both inwards and outwards on the same side. *Ibid.*

4. In such a case the specification did not state at what angle the bevils should be made, and one witness stated, that the angle was material, but another witness stated that any angle would be of some benefit:—*Held*, that if the jury thought that a bevil at any angle would be beneficial, the specification would be good, although it omitted to state any particular angle at which the bevils should be made. *Ibid.*

5. If a patent be taken out for blocks for paving with "stone or any other suitable material," this will include wood pavement, although no wood pavement was in actual use at the date of the patent, and although the inventor might not have had wood pavement in his contemplation. *Ibid.*

PEER, INDICTMENT AGAINST.

See PRACTICE, 4.

PENAL LAW.

See POUND BREACH, 1, 2.

PERJURY.

See EVIDENCE, 16.—VOTER.

1. A. brought an action against B. and his partners for the price of wheat, and recovered a verdict on the bought and sold notes. B. and his partners filed a bill in equity against A., which stated, that the bought and sold notes did not contain all the terms of the contract, as it had been also agreed by parol between A. and B., that the wheat should be paid for by a draft at three months; and the prayer of the bill was, that A. should be restrained from suing out execution. A., by his answer, denied the statement in the bill; and the bill was dismissed:—*Held*, that, if this denial by A. was wilfully false, it amounted to perjury. *Reg. v. Yates*, 132

2. *Held*, also, that B. was a competent witness on an indictment against A. for perjury, alleged to have been committed in the answer, although A. had engaged to indemnify his partners from the expenses of the suit in Chancery. *Ibid*.

3. The rule, that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction. *Ibid*.

4. Where perjury was charged to have been committed in that which was in effect the affidavit on an interpleader rule; and the indictment set out the circumstances of the previous trial, the verdict, the judgment, the writ of fieri facias, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that

the goods were his property, but omitted to state that any rule was obtained according to the provisions of the Interpleader Act:—*Held*, that the indictment was bad, as the affidavit did not appear to have been made in a judicial proceeding. *Reg. v. Bishop*, 302

5. Commissioners acting under a fiat of bankruptcy adjudicated A. to be a bankrupt, and afterwards B. was examined before them touching the estate of A., and gave evidence which was alleged to be false; B. being indicted for perjury, it appeared on the trial that the petitioning creditor's debt, on which the fiat had issued, was not of sufficient amount; but it also appeared that A. owed other debts which might have been substituted for the petitioning creditor's debt by order of the Lord Chancellor, under section 18 of the stat. 6 Geo. 4, c. 16, so as to have rendered the fiat valid, but that no such order had been made:—*Held*, that under these circumstances B. could not be guilty of perjury on this his examination. *Reg. v. Ewington*, 319

6. But *semble*, that if B. had been examined by the commissioners on the preliminary proceedings before them to ascertain whether A. should be adjudged a bankrupt or not, B. might have been guilty of perjury even though there had been no good petitioning creditor's debt. *Ibid*.

7. An allegation in an indictment for perjury, that judgment was "entered up" in an action, is proved by the production of the book from the Judgment Office, in which the incipitur is entered. *Reg. v. Gordon*, 410

8. An office copy of a bill in Chancery, which a witness examined with the original, but which office copy contained abbreviations, such as "pnl. este." for the words "personal estate," in the original bill, is not such an examined copy as will be evidence to sup-

port an allegation of a bill in Chancery on an indictment for perjury, committed in an affidavit in that suit in Chancery. *Reg. v. Christian*, 388

9. *Semble*, that a person may be convicted of perjury contained in an affidavit intitled, in a cause, "A. B. against C. D. and others," although, by the rules of the courts, all affidavits should in their title name all the plaintiffs and all the defendants. *Ibid.*

10. An affidavit was sworn in a cause of the Commissioners of Charitable Donations and Bequests in Ireland, against J. E. D.; and in an indictment for perjury on it, the affidavit was alleged to be intitled in that cause. The affidavit was intitled the "Commissioner," instead of "Commissioners;" but the Lord Chief Justice allowed an amendment of the indictment to obviate an objection as to this variance. *Ibid.*

11. On the trial of an indictment for perjury, alleged to have been committed before magistrates, on the hearing of a case punishable on summary conviction, the conviction by the magistrate is not receivable in evidence, because it is irrelevant. *Reg. v. Goodfellow*, 569

12. If an indictment for perjury allege that G. swore falsely before magistrates, on a charge against K. of receiving stolen goods, this will not be supported by proof that an information against K. on the stat. 17 Geo. 3, c. 56, s. 10, respecting purloined silk, was heard before the magistrates; and that, on that hearing, G. gave evidence that would have been material to a charge of receiving stolen goods by K. *Ibid.*

13. Where to give magistrates jurisdiction to hear a case punishable on summary conviction, it is essential that they should have an information on oath made before them. It is not sufficient, in an indictment for perjury alleged to have been committed on the hearing of such information,

to allege that before M. G., Esq., and T. H. H., clerk, two of the justices, &c. [the magistrates who heard the case] T. O. came, and "exhibited a certain information upon oath," because it does not sufficiently shew that T. O. was sworn before M. G., Esq., and T. H. H., clerk. *Ibid.*

14. In an indictment for perjury, an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to, and stated by the said T. G. upon his oath," is not a good averment of materiality. *Ibid.*

15. A., in an affidavit, stated that he had paid all the debts proved under his bankruptcy, except as to which he explained. On an indictment for perjury on this affidavit, one of the assignments of perjury was, that A. had not paid all the debts proved under his bankruptcy, except two; and that certain creditors [naming them], besides the excepted two, were not paid in full:—*Held*, that if the first assignment of perjury were too general, the defendant should have demurred to it; and that although, by the generality of its form, the prosecutor was not precluded from proving the non-payment of other creditors besides those named, yet, as names were stated in the other assignment of perjury, it was reasonable to presume that the defendant would suppose that those were the persons the non-payment of whose debts were to be relied on, and that in fairness the prosecutor ought not to go into evidence of the non-payment of any other creditors than those named. In support of this indictment several creditors were called, who each proved the non-payment of his own debt:—*Held*, that this was not sufficient to warrant a conviction, and that, as to non-payment of each debt, it was necessary to have the evidence of two witnesses, or of one witness and of such corroborative tes-

timony as is equal to the evidence of a second witness. *Reg. v. Parker*, 639

16. In an indictment for perjury, before commissioners of taxes, on an appeal of H. against a surcharge for a greyhound used by H. on the 24th of November, it was averred to be a material question whether a receipt for the price of the greyhound was given to the defendant before the 12th of September. When before the commissioners, the defendant swore that he bought the greyhound of H. on the 6th of September, and had a receipt for the price before the 12th of that month. It was objected that the sale of the greyhound was the only material fact, that the receipt was immaterial, and that the 12th of September was an immaterial day:—*Held*, that the receipt was material, and that it was properly laid that it was a material question whether the receipt was given on the 12th of September. *Reg. v. Overton*, 655

17. Every question on cross-examination of a witness, which goes to his credit, is material. *Ibid.*

PETITIONING CREDITOR.

In an action brought by a bankrupt against his assignees, to try the validity of the fiat, the petitioning creditor is not a competent witness for the defendant to prove the petitioning creditor's debt; and the fact of his having assigned his debt will make no difference. *Carruthers v. Graham*, 5

PHYSICIAN.

See SURGEON.

A contract to pay a physician cannot be implied from the mere fact of his attendance on a patient, but a promise at the end of his attendance to pay him a fixed sum, or a reasonable compensation, will raise such a contract as will support an action. *Veitch v. Russell*, 362

PLEADING.

See BILL OF EXCHANGE, 2.—DEMURRER.—LANDLORD AND TENANT, 11.—MASTER AND SERVANT, 2.—VENDOR AND PURCHASER, 2.

1. In an action for the infringement of a patent, the defendant cannot, by his notice of objections (given under the stat. 5 & 6 Will. 4, c. 83, s. 5), go beyond his pleas. *Macnamara v. Hulse*, 471

2. Where a defendant is entitled to plead not guilty "by statute," he may, under that plea, go into any defence that could be specially pleaded, whether such defence be founded entirely on the statute, or partly on the statute and partly not, or by a defence wholly independent of the statute. *Maund v. Monmouthshire Canal Co.* 606

PLEADING (FORMS OF).

1. Declaration for a malicious prosecution, in charging the plaintiff with having removed sheds let to him, contrary to the Police Court Act, 2 & 3 Vict. c. 71. 9

2. Declaration for tolls in a port and in a manor, and for tolls generally. 34

3. Plea of payment of money into court for the tolls of the manor, and for the tolls generally, and non assumpsit to the residue. *Ibid.*

4. Plea of part payment of a promissory note to the payee before indorsement. 490

5. Replication that the payment was made to the payee after indorsement. *Ibid.*

INDICTMENTS.

1. Indictment for murder, by neglecting and abandoning a new-born child. 164

2. Refusing to aid a constable. 314

3. For obtaining money by false pretences, of being an unmarried person, and threatening an action for breach of promise of marriage. 517

question had been included in A. B.'s contract with the defendant, yet, if, while the defendant's men were working on the premises, and the defendant's contract was not yet finished, and the house was unoccupied, except by the plaintiff, (the servant of the club), the gas had been turned on by *his* direction and not by that of the defendant or his agent, the defendant was not liable. *Ibid.*

3. In such cases as above, although the plaintiff, through the negligence of the defendant, be disabled for life from performing the duties of the office to which he had been accustomed, yet the measure of his damages is by no means to be taken from the amount of an annuity, which would replace the annual salary of the plaintiff. For, non constat that the plaintiff would have retained his situation for life. *Ibid.*

4. The society of a club, through their committee, employed the defendant to make alterations, &c., in their club-house, and by the misconduct of the defendant's agent an accident occurred:—*Quære*, if the society is answerable as principal, and is the defendant free as intermediate agent? *Semble*, the defendant, as relating to the immediate cause of the action, is the principal. *Ibid.*

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2. The witness, who served a notice of action, did not know the handwriting of the plaintiff, whose signature the notice purported to bear; and no evidence was given of the plaintiff's handwriting:—*Held* sufficient without such proof, as it was enough that the notice should have been served on the plaintiff's behalf. *Forman v. Dawes*, 127

3. The plaintiff refused to exercise the office of parish officer and make a rate for his district, though he had been appointed churchwarden of a chapelry within the union. Whereupon the defendant, the clerk to the board of guardians, obtained by their direction a warrant of justices to levy the amount claimed off the plaintiff's goods, under 2 & 3 Vict. c. 84, s. 1. Upon trespass brought by the plaintiff for this distress:—*Held*, that this trespass was an act done in pursuance of the provisions of the Poor Law Amendment Act, and that therefore the defendant was entitled to notice of action and to the other protections afforded by 4 & 5 Will. 4, c. 76, s. 104. *Carter v. Filliter*, 498

been bound over to appear at the assizes was absent, and that on cross-examination this witness could give material evidence for the prisoner:—*Held*, that this was sufficient ground for postponing the trial, without shewing that the prisoner had at all endeavoured to procure the witness's attendance, as the prisoner might reasonably expect from his having been bound over, that he would appear. *Reg. v. Macarthy*, 625

3. A prisoner had been committed on a charge of high-treason, and afterwards the grand jury returned a true bill against him, with others, for feloniously demolishing a house under the stat. 7 & 8 Geo. 4, c. 30, s. 8. He pleaded to that indictment, and wished to be tried after the other prisoners who were indicted with him, because the witnesses on that charge, when before the magistrates, had not spoken of him, and he had in consequence not been furnished with copies of the depositions. But this was not allowed, as the prosecution might have been commenced without going before any magistrate, and then there would have been no deposition at all. *Reg. v. Simpson*, 669

POUND-BREACH.

1. The plaintiff impounded the cattle of S. for rent arrear. The defendant had before claimed the cattle as his own, denying the title of S. Two days after the distress the cattle were missing, and were found in the defendant's barn. The plaintiff brought his action for pound-breach under the 2 W. & M. s. 1, c. 5, s. 4, and the defendant pleaded not guilty, with "by statute" in the margin of the plea:—*Held*, that the statute was not a penal enactment under 21 Jac. 1, c. 4, so as to let the defendant into any matters of defence on the issue of "Not guilty:" that the rent due was admitted, and the distraining

of the cattle under it, and their impounding, and the legal sufficiency of the pound; and that the only questions for the jury under the issue "Not guilty" were, whether the pound was broken by any other than the cattle themselves, and whether, if so, the defendant broke it. *Castleman v. Hicks*, 266

2. *Semble*, an open field is a pound sufficient at law in which to distrain cattle for rent arrear. *Ibid.*

POWER.

1. A person devised real property to his widow for life, and after her death to his children equally, with a power to the widow to mortgage or sell, in case "the fund" arising from the real and personal estate of the testator was not sufficient for the maintenance of the widow. The widow executed a mortgage of the property for £30 to her son T., and it was proved that four years before the mortgage T. advanced his mother a sum less than £1 to pay a poor's rate that she was unable to pay. The subscribing witness to the mortgage deed had acted as attorney both of the widow and T. respecting it:—*Held*, that, on the trial of an ejectment by the administratrix of T. to recover the property under the mortgage deed, the subscribing witness might be cross-examined to shew that the sum of £30, mentioned in the mortgage deed, and in the receipt at the back of it, was never in fact advanced. *Doe d. Salt v. Carr*, 123

2. *Held*, also, that it was for the jury to say, whether the widow was in such circumstances as to come within the terms of the power, and had had the money really advanced to her, or whether the mortgage was a device to give an advantage to one of the sons, the widow not being in circumstances to require the advance, and in fact never having received the money; and

that in the former case the power would be well executed, and in the latter not. *Ibid.*

PRACTICE.

See AMENDMENT.—BILL OF EXCHANGE, 2, 3.—CENTRAL CRIMINAL COURT.—DEMURRER.—DISCHARGE OF PRISONER.—POSTPONING TRIAL.—STATUTE.—TRAVERSE.

1. If the counsel for a party rely on an act of Parliament, and cite it as an act to be judicially noticed, the opposite party has no right to insist that the counsel citing it should produce a copy of it printed by the Queen's printer. *Forman v. Daves*, 127

2. A prisoner was indicted for killing a cow, and in another indictment for killing a calf. He had pleaded to both indictments, and the jury were charged with the first. By a mistake, the evidence applicable to the second indictment was given, instead of that which was applicable to the first. The mistake was discovered while the prisoner's counsel was addressing the jury:—*Held*, that the evidence properly applicable to the first indictment should then be given. *Reg. v. Wardle*, 144

3. Where a captain in the army surrendered in discharge of his bail to take his trial at the Central Criminal Court, for feloniously shooting at another (in a duel), with intent to kill him, &c., it was *held*, that he must take his place within the dock like all other prisoners charged with felony; but, on his expressing a wish to that effect, he was allowed to have three friends to stand beside him there. *Reg. v. Douglas*, 193

4. Where an indictment for felony was found at the Central Criminal Court against a peer of the realm and several commoners, at a time while the Houses of Parliament were not sitting, the recognizances of the com-

moners were respited from session to session, until after the case of the peer had been disposed of in the House of Lords. *Ibid.*

5. If on a case reserved for the opinion of the fifteen judges the prisoner has no counsel to argue for him, the judges will not hear the counsel for the crown. *Reg. v. Wallace*, 200

6. In Q. B. a cause duly entered for trial at the first sitting in term, and not tried at that sitting, cannot be tried at the second sitting in term, unless the record and writ of distringas are resealed *before the day* appointed for the second sitting; and if there be no resealing before the day appointed for the second sitting, the cause will, under the rule of 25th November, 1825, be omitted from the written list of the second sitting, and the judge at Nisi Prius will not allow a resealing afterwards, in order to have the cause tried at the second sitting, even where the cause has not been reached in its order. *Walker v. Masey*, 366

7. In opening a case, a plaintiff's counsel has a right to refer to and comment on an act of Parliament which has passed since the transaction which is the subject of the action, as it may go to shew what the law was before the passing of the act, but he has no right to state what occurred in the progress of the act through the Houses of Parliament, such as that counsel were heard against its passing, because he would not be entitled to go into evidence of such facts. *Howard v. Gossett*, 380

8. If the counsel for a plaintiff proposes to give evidence in anticipation of the intended defence, but does not do so, the judge then intimating an opinion that the defence cannot be gone into, as it was not specially pleaded, and the judge afterwards allows the defence to be gone into, and the plaintiff adduces his evidence as evidence in reply, and there be a

PRISONER.

verdict for the defendant:—*Held*, that these circumstances are no ground for granting a new trial. *Smith v. Marrable*, 479

9. On a crown case reserved for the opinion of the fifteen judges, their Lordships will not consider any points which are objections on the face of the record, even though they be mentioned in the case reserved, but will leave the prisoner or defendant to bring his writ of error. *Reg. v. Overton*, 655

PRICE.

See GOODS BADLY MADE.

PRINCIPALS IN THE FIRST AND SECOND DEGREES.

See MURDER, 6.—RAPE, 1.

PRIOR CONVICTION.

See LARCENY, 13.

PRISONER (DISCHARGE OF).

Where the trial of prisoners had been successively postponed for two assizes, in consequence of the absence of a material witness, and the affidavit, on which application was made for further postponement, stated, that the witness in question was believed to have gone to India as a soldier, so that there was not any prospect of his soon return, the judge ordered the recognizances of the prosecutor to be discharged, and discharged the prisoners without compelling them to enter into any recognizances for their future appearance. *Reg. v. Bridgman*, 271

PRISONER WHO HAS PLEADED GUILTY.

See WITNESS, 1.

RECEIVING, &c. 717

PRIVATE ACT OF PARLIAMENT.

See PRACTICE, 1.—STATUTE.

PROCESS.

Rule as to issuing process from the Central Criminal Court. 254

PROHIBITION.

See APPOINTMENT, 5.

PROMOTIONS, 107, 357, 493.

RAPE.

1. An indictment is good which charges that A. committed a rape, and that B. was present aiding and assisting him in the commission of the felony. In such a case the party aiding may be charged either, as he was in law, a principal in the first degree, or, as he was in fact, a principal in the second degree. *Reg. v. Crisham*, 187

2. In a case of rape a person to whom the prosecutrix made a complaint recently after the offence may be asked whether she named "a person" as having committed the offence, but not *whose name* she mentioned. *Reg. v. Osborne*, 622

RECEIVER (ENTRIES BY A DECEASED).

See EVIDENCE, 1, 8.

RECEIVING STOLEN GOODS.

See EVIDENCE, 7.—INDICTMENT, 2.

A lad stole a brass weight from his master, and, *after it had been taken from him* in his master's presence, it was *restored to him again*, with his master's consent, in order that he might sell it to a man to whom he

718 RINGING DOOR BELLS.

had been in the habit of selling similar articles, which he had stolen before. The lad did sell it to the man; and the man being indicted for receiving it of an evil-disposed person, well knowing it to have been stolen, was convicted and sentenced to be transported for seven years. *Reg. v. Lyons*, 217

RECOGNIZANCE.

Rule as to recognizance to prosecute before process issues from the Central Criminal Court. 254

RECORD.

See EVIDENCE, 3, 13.

RECORDS (RESEALING).

See PRACTICE, 6.

REDUCTION OF DAMAGES.

See GOODS BADLY MADE.

REFORM ACT.

See VOTER.

REFUSING TO AID A CONSTABLE.

See CONSTABLE, 2, 3.

RENT ROLLS.

See EVIDENCE, 1, 8.

REPLEVIN.

See AMENDMENT, 2.

RESEALING RECORDS.

See PRACTICE, 6.

RINGING DOOR BELLS.

See FALSE IMPRISONMENT, 1.

SERVANT.

RIOT.

See L. C. J. TINDAL'S CHARGE, p. 661.

On a charge of riot, sufficient terror and alarm is proved to support that part of the charge, if *any one* of her Majesty's subjects was terrified. *Reg. v. Langford*, 602

ROBBERY.

See ASSAULT WITH INTENT TO ROB.

An indictment for robbery, which charges the prisoner with having assaulted G. P. and H. P., and stealing from G. P. 2s., and from H. P. 1s., is correct, if the robbing of G. P. and H. P. was all one act, and the counsel for the prosecution will not be put to elect. *Reg. v. Giddins*, 694

SACRILEGE.

The vestry of a parish church was broken open and robbed. It was formed out of what before had been the church porch, but had a door opening into the church-yard, which could only be unlocked from the inside :—*Held*, that this vestry was part of the fabric of the church, and within the meaning of an indictment for sacrilegiously breaking and entering the church. *Reg. v. Evans*, 298

SALE.

See AUCTION.—VENDOR AND PURCHASER.

SAMPLE.

See AUCTION.

SEARCH.

See TRESPASS, 6.

SEDITION.

See L. C. J. TINDAL'S CHARGE, p. 661.

SERVANT.

See MASTER AND SERVANT.—SLANDER, 1, 2.

SHAREHOLDER.

See EMBEZZLEMENT, 3.

SHIPPING.

See MASTER AND SERVANT, 1.

1. By a charter-party, "fifteen days" were to be allowed to the freighter of a ship, "for discharging at her destined port." The freighter ordered the ship to Hull. She was got into the Hull Docks on the 1st of February, and was on that day put in the charge of the dock company's officers, but from the crowded state of the docks she was not put in her berth, and did not begin discharging till the 4th:—*Held*, that the fifteen days were to be computed from the 1st, and that in such cases the days count from the time of the vessel's arriving in the dock, and being put in the management of the dock company's officers. *Brown v. Johnson*, 440

2. In reckoning the "fifteen days," the days are to be reckoned consecutively, and the Sundays not deducted, unless there be a custom to that effect; and in the absence of any custom, the word "days," and the words "running days," mean consecutive days. *Ibid.*

3. The general rule of law is, that days mean consecutive days, except Sunday is the first or the last day; but in commercial cases it is sometimes otherwise, because mercantile contracts are to be construed with reference to mercantile usage. *Ibid.*

4. By a charter-party a ship was to proceed to Honduras and there load, "at one of the usual and customary ports or places of loading, including the rivers Ulna and Dulce," a cargo of mahogany and logwood. The freighter by letter directed the captain to proceed to Belize in the bay of Honduras, and address himself to Mr. S., "who will furnish you

with a homeward cargo of mahogany and logwood, agreeable to charter-party." The captain took the ship to Belize, where Mr. S. put a small quantity of logwood on board and directed the ship to go to Ulna, where about half a cargo was put on board. Mr. S. then sent the ship to two other places of loading in Honduras, at which the cargo was completed:—*Held*, that it was a question for the jury whether the ship was sent to Belize as her port of loading; and that if she was, the freighter was liable for the extra expenses of her going to all the other places for the residue of her cargo; but that, if Belize was not to be considered her port of loading, Ulna certainly was, and the freighter would at all events be liable for the extra expense of her going for cargo to other places after Ulna, as by the charter-party the freighter was to load at one of the usual ports or places of loading in Honduras. *Ibid.*

SHIPS (DESTROYING).

See ACCESSORY, 2, 3.

SIGNATURE.

See AGREEMENT.

SIGNING.

See AGREEMENT.

SILK TRADE (OFFENCES RELATING TO THE).

See PERJURY, 12, 13.

SLANDER.

1. The defendant spoke to the plaintiff's mistress words charging the plaintiff with irregularity in her conduct as a servant, in consequence of which the plaintiff lost her place. The only plea on the record was, Not guilty. It was held, that the defendant might, under that plea, disprove malice in

the various methods by which it is usually disproved; yet that he could not be allowed to give evidence of the truth of the facts as rebutting the malice, because he had not pleaded that the facts were true. *Rumsey v. Webb*, 104

2. Though in such case the absence of the proof of special damage, (that the plaintiff thereby lost her place), cannot affect the verdict, yet the jury may consider it in assessing damages. *Ibid.*

3. The dismissal by the police commissioners of a police constable, in consequence of a report duly made to them of a censure uttered on such police-officer by a justice of the peace, is in itself sufficient evidence of special damage to sustain an action against the justice. *Kendillon v. Maltby*, 402

4. In such an action evidence of malice is necessary; for it is the duty of the justice to express his opinion of the conduct of police constables, in order that the police commissioners may have proper information on which to proceed in making inquiries to enable them to regulate the force under their direction. *Ibid.*

SOUNDNESS.

See WARRANTY.

SPEAKER'S WARRANT,

See TRESPASS, 6.

SPECIAL DAMAGE.

See SLANDER, 3.

SPECIAL JUROR.

See JURORS (CHALLENGE OF).

SPEEDY EXECUTION.

See EXECUTION.

STIPULATED PRICE.

STAMP.

See LANDLORD AND TENANT, 5.—
BILL OF EXCHANGE, 12.

1. A paper was in the following form, "I, R. J. M., owe Mrs. E. the sum of £6, which is to be paid by instalments, for rent. (Signed) R. J. M.:" — *Held*, not to be a promissory note, as no time was stipulated for the payment of the instalments. *Moffatt v. Edwards*, 16

2. If plaintiffs put in one part of a written agreement which is signed by the defendant only, and is duly stamped, the defendant may put in the other part of the agreement, which is signed by one of the plaintiffs "for self and the other executors," although that part of the agreement is not stamped. *Turner v. Hardey*, 449

STATUTE.

See INDICTMENT, 4.—PRACTICE, 1.

Where, by a private act of Parliament, printed copies of it, printed by the Queen's printer, are made evidence, a defendant's counsel at Nisi Prius cannot make an objection, founded on that act, a ground of an application for a nonsuit, if the act has not been given in evidence on the part of the plaintiff, because it is not an act to be judicially noticed, and is only before the court when given in evidence. *Greswold v. Kemp*, 635

STATUTE OF FRAUDS.

See AGREEMENT.

STEWARD (ENTRIES BY A DECEASED).

See EVIDENCE, 1, 8.

STIPULATED PRICE.

See GOODS BADLY MADE.

SUMMONS.

See EVIDENCE, 19.

SURGEON.

See EVIDENCE, 18.

1. The plaintiff practised as physician and surgeon. On a case occurring in which the advice of a physician was considered necessary as well as the aid of a surgeon, he was called in. It appeared in evidence that he had performed for his patient some services which usually are in the province of a surgeon. The plaintiff sent his bill to the executors of his patient:—*Held*, that if the jury considered that the plaintiff had done any work as surgeon, they should find a verdict for him to the amount of the value of that service. *Battersby v. Lawrence*, 277

2. A physician cannot sue for his fees for any thing he has done as a physician, either in attending or in prescribing medicine for a patient; but if he acts as a surgeon, or in any other capacity than that of physician, he may maintain an action for a compensation for what he has done, provided he can shew that it was not done by him as a physician; and the fact that the plaintiff was not paid fees at the times when he was consulted, goes to shew that he was not acting as a physician. *Little v. Oldaker*, 370

TALES.

See ISSUE FROM THE COURT OF CHANCERY, 1, 3.

TERMINI.

See HIGHWAY, 1.

TITHES.

See EVIDENCE IN REPLY, 3.

TOLLS.

See EVIDENCE, 2, 3, 4.

VOL. I.

TRAVERSE.

If a defendant is bound by recognizance to appear and try his traverse, he cannot by surrendering himself in custody avoid the payment of the fees customary on the entering of a traverse. *Reg. v. Bishop*, 302

TREASON.

See L. C. J. TINDAL'S CHARGE, p. 661.—POSTPONING TRIAL, 3.

TRESPASS.

See BEGIN (RIGHT TO), 1.—EVIDENCE, 6.

1. The defendants were partners in business as brewers; and one of them, in the name of the others, wrongfully ejected the tenant of a canteen, who held under a lease from the Board of Ordnance, they (the defendants) being sureties for the payment of his rent, and for his quiet tenantry. It was ruled that one partner has no right to involve another, unless in the ordinary course of their business, not, for instance, in a trespass, as above stated. *Petrie v. Lamont*, 93

2. The exception to this doctrine is in the case where the trespass is in the nature of a taking which is available to the partnership; and in such case the jury should find, not only whether the defendants were partners, but also whether, before the trespass, they all joined in ordering it, or whether, afterwards, they concurred, and received the benefit of it. *Ibid*.

3. Where one of the trespassers is servant to the others, it is a question for the jury, whether he acted merely as servant, or whether he were so implicated in the matter as to make himself a principal trespasser. *Ibid*.

4. A trespass was committed by the defendant's carriage driving against the plaintiff's gig; but the defendant was riding in a hired carriage at the time with hired horses and hired

postilions, yet as he made no remonstrance against the course which the drivers were taking till his admonition came too late:—*Held*, that he was liable in an action of trespass, as a co-trespasser with the postilions. *M'Laughlin v. Pryor*, 354

5. In an action of trespass it is competent for the jury to consider the words which the defendant used subsequently to the trespass, in coming to the conclusion whether he were a joint trespasser with those actually committing the mischief. *Ibid*.

6. Officers of the House of Commons, who have a warrant of the Speaker to take a person therein named, although they may have a right to enter his house (having been peaceably admitted) and to search the house, they have no right, in case they do not find him, to remain there to await his return; and if they stay several hours in the house for that purpose, they are trespassers ab initio. *Howard v. Gossett*, 380

7. The defendant let apartments in his house to the plaintiff, and on a dispute arising, he locked up one of the rooms in which there were certain wares and merchandize belonging to the plaintiff, and he kept the key, ordering the plaintiff's servant not to come on the premises again. The plaintiff himself left the house, and subsequently brought an action of trespass for the seizure of his goods:—*Held*, that there was not a sufficient seizure to support the action. *Hartley v. Mozham*, 504

8. Trespass will lie against a corporation aggregate for an act done by their agent within the scope of his authority, and in such an action it is not necessary to shew the appointment or authority of the agent under the seal of the corporation. *Maund v. Monmouthshire Canal Co.* 606

TRIAL (POSTPONING).

See POSTPONING TRIAL.

TROVER.

See DETINUE.

1. Though a fraudulent vendee may be sued in trover by the vendor, yet the right of action does not exist against every person into whose hands the property may have passed subsequently. *Sheppard v. Shoolbred*, 61

2. If G. obtained goods from the plaintiffs by fraud, and sold them to the defendants, yet, if the defendants were not privy to the fraud, they are not liable to the plaintiffs in trover. *Ibid*.

3. G. bought cotton goods of the plaintiffs to the amount of £816, and they were afterwards sold by R. to the defendants for £589. No other transactions were shewn between G. and R.:—*Held*, that the connexion between the plaintiffs and defendants was too remote to raise a cause of action, unless the jury were convinced that G. obtained the goods originally by fraud, and that the defendants bought them under circumstances which must have convinced them that the goods were so obtained. *Ibid*.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 7, 9, 10, 11, 12.

VARIANCE.

See AMENDMENT.

VENDOR AND PURCHASER.

See AUCTION.

1. In a declaration, in an action for not completing a purchase of copyhold, it was alleged that, on the 27th of June, the plaintiffs "were ready and willing, at the office of the said steward of the said manor of N., to receive the residue of the said purchase-money, and then and there to surrender." This was denied by the plea:—*Held*, that

this allegation was proved by shewing that the plaintiffs were ready and willing to have gone to the steward's office on that day to surrender, but did not do so, because, on the 25th, the defendant said to the solicitor who was concerned for all parties that he was not ready to complete the purchase on the 27th. *Perry v. Smith*, 554

2. If a plaintiff, in his declaration, aver the performance of a condition precedent, and the defendant deny this by his plea, and the plaintiff reply matter of excuse for not performing the condition, this will be a departure. *Ibid.*

3. A purchaser had agreed to complete a purchase on the 27th of June. The solicitor, who was concerned for all parties, called on him on the 25th of June, and asked him if he would be ready to complete on the 27th:—*Held*, that what the purchaser said in answer was not a privileged communication. *Ibid.*

4. A purchaser agreed that if the completion of the purchase "should be delayed on his part" beyond the 27th of June, he would pay interest. The vendor and his trustee were willing to complete on that day, but the purchaser was not prepared; but on the 28th of November, when the purchaser was ready, the vendor's trustee would not join:—*Held*, that the purchaser was liable to interest only from the 27th of June to the 28th of November. *Ibid.*

VENUE.

See INDICTMENT, 6, 7.

VERDICT.

See INDICTMENT, 8.

VOLUNTARY OATHS.

See OATHS (ADMINISTERING UNNECESSARY).

VOTER.

1. A voter, having changed his residence since the last registration, cannot be indicted under the 2 Will. 4, c. 45, for swearing that he has still the same qualification, if the sheriff's deputy should omit, at the time the voter tenders his vote, to read over to him the specific qualification from the register. *Reg. v. Lucy*, 511

2. If A., who is registered as an elector for a borough as a £10 householder, gives up the house in respect of which he is registered, and takes another of superior value within the same borough, after the registration and before the election, he loses his vote; and if before and at the time of the election a new tenant has taken possession of the house that A. has left, and is paying rent for it, the facts that a few articles of A.'s furniture remain in the house, and that A. retains one of the two keys of it, will make no difference. *Reg. v. Bowler*, 559

3. *Semble*, that an indictment against a voter for giving a false answer at the poll, which states, that at a certain election for a member of Parliament for the borough of S., the defendant appeared as a voter, and tendered his vote as such, and that he gave a false answer, that he had the same qualification for which he was put on the register, whereas in truth he had not, is bad, because it states all the matters by way of recital, and because it neither states the writ nor the precept for holding the election, nor that the defendant's name was ever on the register. *Ibid.*

4. A voter in a borough who was registered as a 10l. householder in respect of a house in "E. Place," loses his vote if, after the registration and before the election, he removes to another house of equal value in E. Place, although the house to which he removes is in every respect within

the description contained in the register. *Reg. v. Ellis*, 564

5. The "same qualification" in the 58th section of the Reform Act, 2 & 3 Will. 4, c. 45, means the same identical property. *Ibid.*

6. In a register of borough voters, the word "Penkhull," which denoted a portion of the borough, was put at the head of several names, including that of the defendant, who was on the register in respect of a house in E. Place:—*Held*, that if there was no other E. Place in the borough, it was not necessary for the deputy returning-officer, in putting the third question under the Reform Act, to add the word "Penkhull" as part of the description. *Ibid.*

7. The word "wilfully" in an indictment, in the 58th sect. of the Reform Act, 2 & 3 Will. 4, c. 45, for giving a false answer at the poll, should be construed in the same way as in an indictment for perjury, and be supported by the same sort of evidence. *Ibid.*

8. In an indictment under the Reform Act, 2 & 3 Will. 4, c. 45, for giving a false answer at the poll at an election of the member of Parliament for a borough, it is not essential that the returning-officer should himself put the three questions to the voter, under sect. 58 of the Reform Act, 2 & 3 Will. 4, c. 45; it is sufficient if the town-clerk do it in his presence, and by his direction. Neither is it necessary to shew that the agent who required the question to be put was expressly appointed by the candidate; it is sufficient to shew that he has acted as agent for the candidate. *Reg. v. Spalding*, 568

WARRANT.

See TRESPASS, 6.

WARRANTY.

In an action for breach of warranty

WITNESS.

of soundness in an animal, the meaning of the word "sound" is, that the animal is free from disease at the time he is warranted to be sound. If the disease were not of a kind to impede the natural usefulness of the animal in the purpose for which he is to be used, it would not constitute unsoundness. But no argument can be adduced for the defendant from the slightness of the disease or the facility of its cure; for it is not possible to limit the time of cure; though the slightness of the animal's disorder may be a fit subject for the consideration of the jury in assessing damages. *Kiddell v. Burnard*, 291

WILFUL DAMAGE.

See LANDLORD AND TENANT, 1.

WITNESS.

See DEPOSITION. — EVIDENCE. — PERJURY, 3, 15. — POWER, 1.

1. A. and B. were jointly charged in the same indictment with breaking into the house of J. H. and stealing his goods. A. pleaded guilty, and B. pleaded not guilty, and was tried. A.'s plea of guilty was recorded, but no sentence had been passed on him. B. wished to call A. as a witness for him:—*Held*, that he might do so. *Reg. v. George*, 111

2. Mode of swearing a Chinese witness. *Reg. v. Entekman*, 248

3. A judge at Nisi Prius will not compel a witness to produce a document under a subpoena duces tecum, if, as against the party asking its production, the witness has a lien on the document which is called for. *Kemp v. King*, 396

4. In an action against a person sued as executor of A., in which plene administravit is pleaded, and in which no evidence has been given as to how A. has disposed of his pro-

party, or even that he left any will, the widow of A. is not a competent witness for the defendant: and this is not a case in which the witness can be rendered competent by indorsing her name on the record under the stat. 3 & 4 Will. 4, c. 42, ss. 26, 27. *Yardley v. Arnold*, 434

5. If a witness is sworn in chief, but has not been asked any question in his examination in chief, it is not too late to take an objection to his competency, on the ground of interest, and such an objection is not confined to examinations on the voir dire. *Ibid.*

6. A witness being sworn, and having then in court a document in his possession, is bound to produce it, if required, though he have not received any notice to produce, nor been served with a subpoena duces tecum. *Snellgrove v. Stevens*, 508

7. If in a conveyance, A., the conveying party, has covenanted that for and notwithstanding any act, matter, or thing done or committed by him, he has a good title. This does not render A. an incompetent witness in an ejectment brought for the premises by his grantee, unless it be shewn that the defendant's title arose from some act of A. *Doe d. Meyrick v. Howells*, 648

8. On the trial of an action on a bill of exchange, where the cause was undefended, one of the jury said that the stamp was forged, and called the attention of the judge to the fact:—*Held*, that the jurymen must be sworn as a witness to give evidence to his brother jurors before they can act upon his opinion; and, on his declining to be sworn as a witness, the judge told the jury they must find for the plaintiff. *Manley v. Shaw*, 361

WITNESS IMPROPERLY SWORN TO GO BEFORE THE GRAND JURY.

When the grand jury have found a

bill, the judges, before whom the case comes to be tried, ought not to inquire whether the witnesses were properly sworn previously to their going before the grand jury; and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge merely. *Reg. v. Russell*, 247

WORDS.

See SLANDER.

WOUNDING.

1. On an indictment for wounding, with intent to do grievous bodily harm, it appeared that two persons, one of whom was the prisoner, attacked and wounded the prosecutor, and robbed him; it was not proved which of the two persons inflicted the wound:—*Held*, that if the prisoner inflicted the wound on the prosecutor with intent to rob him, he having at the same time an intent to do him grievous bodily harm to effectuate such his intention of robbing, he ought to be convicted on this indictment. *Reg. v. Bowen*, 149

2. *Held*, also, that even if the prisoner's was not the hand that inflicted the wound, he ought to be convicted on this indictment, if the jury are satisfied that the two persons were engaged in the common purpose of robbing the prosecutor, and that the other person's was the hand which inflicted the wound. *Ibid.*

3. A broker and his men having levied a distress for rent, the man left in possession was ejected. The owner of the goods was not in the room at the time of the levy, and it was not proved that he was a party to the turning out of the man, or that he knew of the distress being levied; but on the broker and his assistants breaking open the outer door to re-enter, the prisoner struck one of the assist-

ants with an axe on the forehead:—*Held*, that under these circumstances the prisoner must at least be found guilty of an assault; and also, that although he might be found guilty of wounding with intent to murder, or to do grievous bodily harm, yet he could not be found guilty of wounding with intent to maim and disable. *Reg. v. Sullivan*, 209

4. Where three persons were indicted jointly for cutting and wounding, and the third of them did not come up to the spot until after one of the first two had got away, and then

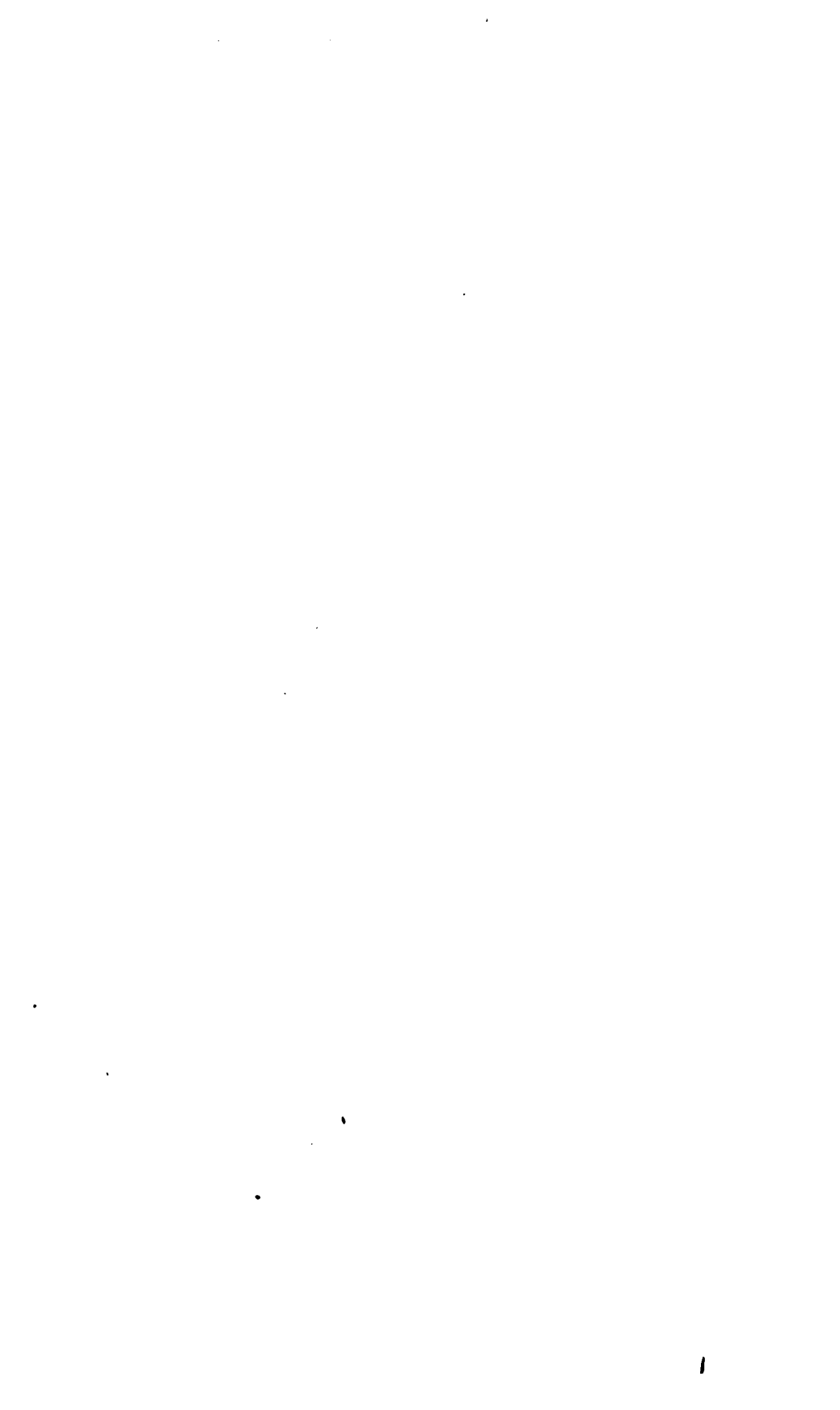
kicked the prosecutor while he was on the ground struggling with the other,—it was *held*, that the two, who jointly assaulted the prosecutor and wounded him at first, might be found guilty either of the felony or of an assault only, but that the third prisoner must under the circumstances be acquitted altogether. *Reg. v. M'Phane*, 212

WORKMEN (COMBINATION OF).

See L.C.J. TINDAL'S CHARGE, p. 661.

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